TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1942

No. 591

THE WEST VIRGINIA STATE BOARD OF EDUCATION, ETC., ET AL., APPELLANTS,

vs.

WALTER BARNETTE, PAUL STULL AND LUCY MCCLURE

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA

FILED DECEMBER 16, 1942.

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[fol. a]

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA, AT CHARLESTON

WALTER BARNETTE, PAUL STULL, and LUCY MCCLURE, Plaintiffs,

vs.

THE WEST VIRGINIA STATE BOARD OF EDUCATION, Composed of Honorable W. W. Trent, President, Mary H. Davisson, Thelma B. Loudin, Raymond Brewster, Lydia C. Hern, L. V. Thompson, and Mrs. Douglas W. Brown, and All Other Boards, Officials, Teachers and Persons Subject to the Jurisdiction and Control of Said State Board of Education, Defendants

Hayden C. Covington, Esq., and Horace S. Meldahl, Esq., Counsel for Plaintiffs and Appellees, and W. S. Wysong, Esq., Ira J. Partlow, Esq., and Samuel Biern, Esq., Counsel for Defendants and Appellants.

(Be It Remembered that heretofore, to-wit: On the 19th day of August, 1942, came the Plaintiffs, by Counsel, and filed in the office of the Clerk of the District Court of the United States for the Southern District of West Virginia, at Charleston, their complaint and appendix therewith, and, upon the hearing of this action before the three-judge court, the Plaintiffs were permitted to file an amended complaint, which amended complaint and appendix therewith are in the words and figures as follows:)

[fol. 1] IN UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF WEST VIRGINIA, CHARLESTON DIVISION

[Title omitted]

FIRST AMENDED COMPLAINT

To Said Honorable Court:

Now come the above named plaintiffs and complain of the above named defendants, and for a cause of action would show:

1. JURISDICTION is based upon existence of a "federal question" irrespective of the amount of money involved, in

that this action arises under the Constitution and laws of the United States and involves purely and solely "civil rights" under and by virtue of the Civil Rights Act of 1871 and Section 24 (14) of the Judicial Code [28 U. S. C. 41 (14)], because this is an action brought to redress the deprivation of "civil rights" by persons acting under color of statutes and regulations of a state. The Court also has jurisdiction by virtue of Section 24 (1) of the Judicial Code [28 U. S. C. 41 (1)], in that the cause of action arises under [fol. 2] the Constitution and laws of the United States and that as to each person for whom this action is brought the matter in controversy exceeds, exclusive of interest and costs, the sum or value of $3,000.

2. All the plaintiffs are citizens of the United States of America and resident citizens of the State of West Virginia.

3. Each individual defendant is a resident citizen of the United States of America and of the State of West Virginia. The defendant-board is a political subdivision of the State of West Virginia. Said individual defendants are now and were at all times material hereto the duly elected, qualified and acting members of the West Virginia State Board of Education, and have under their control all local school boards, county and municipal school districts and the respective officials and teachers of all public schools within said State. That the defendant-board is a body politic and corporate in law and has the general supervision over the enforcement of rules and regulations prescribed by it for the conduct of all public schools within said State. That the individual defendants and all the officials and teachers of the various public schools of said State are agents, servants and employees of the West Virginia State Board of Education in the enforcement of all said rules and regulations.

4. Plaintiffs and their children of compulsory school age are Jehovah's witnesses and bring this action for themselves individually and as a class action for the use and benefit of their children and for all other of Jehovah's witnesses and their children of compulsory school age throughout the entire State of West Virginia.

[fol. 3] 5. That Jehovah's witnesses are an unincorporated body of followers of Jesus Christ who are entirely

devoted to His Father, ALMIGHTY GOD "whose name alone is JEHOVAH", and who are diligent and faithful in carrying out the commands of the Most High God as recorded in Holy Writ and are not a sect, cult or religion. Each of them is in a covenant with Almighty God to obey His will and by the terms of which covenant they are required to give witness to the name, honor and majesty of Almighty God, JEHOVAH, and His Theocratic Government. Jehovah's witnesses are not a recently organized group but members of such group have been active on earth at all times during more than six thousand years last past. Jehovah's witnesses accept the Bible as the Word of Almighty God, and conscientiously believe that a failure to obey the precepts and commandments laid down therein will in due time result in their eternal destruction at the hand of Almighty God. Plaintiffs, their children and all other of Jehovah's witnesses sincerely and honestly believe that the act of participating in the flag-salute ceremony or saluting any flag of any nation or state contravenes the law of ALMIGHTY GOD in this, to wit:

(a) To salute a flag would be a violation of the command of Almighty God stated in the Bible book of Exodus, chapter 20, verses 2, 3, 4, 5 and 6, which reads as follows:

"I am JEHOVAH thy God, • • • Thou shalt have no other gods before me. Thou shalt not make unto thee any graven image, or any likeness of any thing that is in heaven above, or that is in the earth beneath, or that is in the water under the earth: thou shalt not bow down thyself to them, nor serve them: for I JEHOVAH thy God am a jealous God; visiting the iniquity of the fathers upon the children unto the third and fourth generation of them that hate me; and showing mercy unto thousands of them that love me, and keep my commandments."

in that said salute signifies that the flag is exalted, as an [fol. 4] emblem or image of the government, above JEHOVAH GOD, and as such entitled to the honor, devotion, obeisance and reverence of the saluter, which are due only to JEHOVAH and His Son the Lord Jesus Christ.

(b) To participate in a flag-salute ceremony or to salute a flag means, in effect, to participate in a religious "rite" on ceremony and that the one saluting the flag ascribes sal-

vation and protection to the thing or power which the flag stands for and represents, and that since the flag and the government it symbolizes are of the world and not of JEHOVAH GOD, it is wrong only for one in a covenant with JEHOVAH, such as each plaintiff and his children, to salute the flag, and for him to do so constitutes his denial of the supremacy of Almighty God, and contravenes God's express command set forth in Holy Writ, which results in everlasting destruction by JEHOVAH of such person's right to life.

6. That plaintiffs and all other of Jehovah's witnesses for whom this action is brought at all times endeavored to instruct and inform their children of the truths, including the above commandments, set forth in the Word of God, the Bible. They desire to educate their children and bring them them up as upright and sincere followers of Jesus Christ, all as it is their right, privilege and duty to do; that said children have been so instructed from an early age and are now and have been at all times material hereto sincere believers in God's commandments written in the Bible and have faithfully endeavored to obey such.

7. Plaintiffs are loyal to the United States and the State of West Virginia and willingly obey its laws, but they nevertheless believe that their first and highest duty is to [fol. 5] their God and His commandments and laws, and that as true followers of the Lord Jesus Christ they have no alternative except to obey God's commandments and to follow their conscientious convictions. They are willing, in lieu of participating in said flag-salute ceremony, periodically and publicly to subscribe to the following pledge, to wit:

"I have pledged my unqualified allegiance and devotion to Jehovah, the Almighty God, and to His Kingdom, for which Jesus commands all Christians to pray.

"I respect the flag of the United States and acknowledge it as a symbol of freedom and justice to all.

"I pledge allegiance and obedience to all the laws of the United States that are consistent with God's law, as set forth in the Bible."

8. Plaintiffs and other of Jehovah's witnesses for whom this action is brought have children, aggregating many hundreds, who are of compulsory school age and bound by law

to attend the various public schools throughout the said State.

9. Section 5, Article 2, Chapter 18 of the Code of West Virginia, 1931, reads in part as follows:

Sec. 5. *General Powers and Duties.* Subject to and in conformity with the Constitution and laws of this State, the state board of education shall determine the educational policies of the State, except as to the West Virginia University, and shall make rules for carrying into effect the laws and policies of the State relating to education, including rules relating to * * * the general powers and duties of county and district boards of education, and of [school trustee], teachers, principals, supervisors, and superintendents, and such other matters pertaining to the public schools in the State as may seem to the Board to be necessary and expedient.

10. Section 5-A, Article 8, Chapter 18 of the Code of West Virginia, 1931, as last amended on Compulsory School Attendance, reads as follows:

Sec. 5-A. If a child be dismissed, suspended or expelled from school because of refusal of such child to meet the [fol. 6] legal and lawful requirements of the school and the established regulations of the county and/or state board of education, further admission of the child to school shall be refused until such requirements and regulations be complied with. Any such child shall be treated as being unlawfully absent from school during the time he refuses to comply with such requirements and regulations and any person having legal or actual control of such child shall be liable to prosecution under the provisions of this article for the absence of such child from school.

11. Section 9, Article 2, Chapter 18 of the Code of West Virginia 1931 as amended by Chapter 38 of the Acts of the Legislature of 1941, among other things reads as follows:

Section 9. In all public, private, parochial and denominational schools located within this state there shall be given regular courses of instruction in history of the United States, in civics, and in the constitutions of the United States and of the state of West Virginia, for the purpose of teaching, fostering and perpetuating the ideals, principles and spirit of Americanism, and increasing the knowl-

edge of the organization and machinery of the government of the United States and of the state of West Virginia. *The state board of education shall, with the advice of the state superintendent of schools, prescribe the course of study covering these subjects for the public elementary and grammar schools, public high schools and state normal schools. It shall be the duty of the officials or boards having authority over the respective private, parochial and denominational schools to prescribe courses of study for the schools under their control and supervision similar to those required for the public schools.*

12. Pursuant to authority given under the foregoing statutes the defendant-board has promulgated a regulation for the conduct of all public schools within said State, requiring that all pupils participate in the flag-salute ceremony. Said regulation was effective long prior to January 1942. On January 9, 1942, the defendant-board adopted the following regulation:

Whereas, The West Virginia State Board of Education holds in highest regard those rights and privileges guaranteed by the Bill of Rights in the Constitution of the United States of America and in the Constitution of West Virginia, specifically, the first amendment to the Constitution [fol. 7] of the United States as restated in the fourteenth amendment to the same document and in the guarantee of religious freedom in Article III of the Constitution of this State, and

Whereas, The West Virginia State Board of Education honors the broad principle that one's convictions about the ultimate mystery of the universe and man's relation to it is placed beyond the reach of law; that the propagation of belief is protected whether in church or chapel, mosque or synagogue, tabernacle or meeting house; that the Constitutions of the United States and of the State of West Virginia assure generous immunity to the individual from imposition of penalty for offending, in the course of his own religious activities, the religious views of others, be they a minority or those who are dominant in the government, but

Whereas, The West Virginia State Board of Education recognizes that the manifold character of man's relations may bring his conception of religious duty into conflict with the secular interests of his fellowman; that conscientious

scruples have not in the course of the long struggle for religious toleration relieved the individual from obedience to the general law not aimed at the promotion or restriction of the religious beliefs; that the mere possession of convictions which contradict the relevant concerns of political society does not relieve the citizen from the discharge of political responsibility, and

Whereas, The West Virginia State Board of Education holds that national unity is the basis of national security; that the flag of our Nation is the symbol of our National Unity transcending all internal differences, however large within the framework of the Constitutions; that the Flag is the symbol of the Nation's power; that emblem of freedom in its truest, best sense; that it signifies government resting on the consent of the governed, liberty regulated by law, protection of the weak against the strong, security against the exercise of arbitrary power, and absolute safety for free institutions against foreign aggression, and

Whereas, The West Virginia State Board of Education maintains that the public schools, established by the legislature of the State of West Virginia under the authority of the Constitution of the State of West Virginia and supported by taxes imposed by legally constituted measures, are dealing with the formative period in the development in citizenship that the Flag is an allowable portion of the program of schools thus publicly supported.

Therefore, be it Resolved, That the West Virginia Board of Education does hereby recognize and order that the com- [fol. 8] monly accepted salute to the Flag of the United States—the right hand is placed upon the breast and the following pledge repeated in unison: "I pledge allegiance to the Flag of the United States of America and to the Republic which it stands; one Nation, indivisible, with liberty and justice for all"—now become a regular part of the program of activities in the public schools, supported in whole or in part by public funds, and that all teachers as defined by law in West Virginia and pupils in such schools shall be required to participate in the salute honoring the Nation represented by the Flag; provided, however, that refusal to salute the Flag be regarded as an act of insubordination, and shall be dealt with accordingly.

13. Said Board modified said salute at the instance of the Parents and Teachers Association, The Boy and Girl

Scouts, The Red Cross, and The Federation of Women's Clubs, because 'being too much like Hitler's'. Said Board has given no consideration to the wishes of Jehovah God as set forth in the Holy Bible, and the salute as modified was too much like Hitler's. Said State Board, its agents, servants and employees have been arbitrary and discriminating toward Jehovah's witnesses, who have been trying to get them to correct these requirements without the necessity of legal proceedings. That recently and since the above described change from the "stiff-arm" salute the said Board has readopted, by resolution, said "stiff-arm" salute, requiring the saluter to keep the raised-hand palm turned up when saluting.

14. Since 1940, throughout said State, great numbers of children of Jehovah's witnesses, on refusing to participate in said ceremony and salute the flag as required, have been expelled from school and denied the right to attend the public schools until they would agree to violate and would actually violate their conscience by participating in said flag-salute ceremony. That great numbers of said children [fol. 9] have been excluded from attending any of the public schools of said State during the terms of school since 1940 to this date. That the various principals and teachers of said schools that have excluded said children have acted as agents of and under direction of the defendant-board. That the sole reason for said expulsion and exclusion of said children and their subsequent inability to attend any of said public schools is their refusal to salute the flag and not because they have violated any other rule of the respective schools they had attended. In other respects said children were well behaved and obeyed all rules except that pertaining to the flag salute.

15. That numerous parents of said children have been actually charged, prosecuted and convicted for the alleged offense of contributing to delinquency of said minors who have been denied schooling by the defendant-board, its agents, servants and employees as aforesaid. The basis for these prosecutions has been the fact that said parents taught their children the Word and commandments of Almighty God, and the fact that said children elected to refuse to salute the flag.

16. That under the school laws of said State each person for whose benefit this action is brought has children who

are required by such laws to attend the public schools of the district in which he lives unless said children are receiving equivalent education in a private school. That each of the persons for whose benefit this action is brought is financially unable to have his said child or children attend any private school where such equivalent instruction is obtainable. That if said children receive an education at all [fol. 10] the only place they can receive it is in the public schools of said State.

17. The defendants, their agents, servants and employees threaten to continue to enforce said flag-salute regulation so as to require said children to salute the flag or be permanently excluded from the public schools of said State.

18. That the 1942-1943 school term is now about to begin and in early September many hundreds of children of Jehovah's witnesses are required to enroll and will enroll in the public schools of this State. They will refuse to salute the flag. The children will be expelled by reason of the threatened continued enforcement of the above flag-salute regulations of defendant-board in every school throughout said State. Thus said children and their parents will be denied their civil and property rights contrary to law. That said parents have been, are now and will continue to be financially unable to provide said children instruction in private schools equivalent to that obtainable in the public schools.

19. That adult persons for whom this action is brought have been and are threatened with immediate continued prosecution under penal statutes prohibiting the contributing to allege truancy and alleged delinquency of their minor children of compulsory school age because said children are by defendants denied the right to attend public schools.

20. That great numbers of children of compulsory school age for whom this action is brought have been and are threatened with proceedings against them under the delinquency laws of said State authorizing commitment of children adjudged delinquent to reformatories and training [fol. 11] schools maintained for criminally inclined juveniles.

21. That for each said adult to send his child or children to a private school maintaining standards approvable under

said State's educational laws would entail an annual expense of not less than $500 for each child, which expense would continue until each of said children reaches an age which exempts him from compulsory attendance at an approved school, requiring each of said adult persons to bear an average total expense exceeding $3,000, exclusive of interest and costs, which expense each of said adults would be required to pay or incur in order to comply with the compulsory education laws of said State.

22. By reason of the aforesaid conduct on the part of defendants, their agents, servants and employees, the plaintiffs and other of Jehovah's witnesses have been interfered with, and the exercise of their constitutional, civil and property rights has been frustrated, by the defendants. That the defendants' acts and threatened acts above described have produced and will continue to produce great, immediate and irreparable injury and loss to plaintiffs and all other of Jehovah's witnesses similarly situated in said State.

23. Plaintiffs and all others for whom this action is brought are without adequate remedy at law, and the above described conduct and the trespasses of defendants above described are continuous. Only a suit for injunctive relief will stop such unlawful conduct of defendants and it is only by injunctive process of this Court that plaintiffs can enjoy, exercise and practice their "civil rights" of free press, free speech, freedom of assembly and freedom to worship [fol. 12] Almighty God publicly. It is necessary that such injunctive relief hereinafter requested be granted in order properly and adequately to protect Jehovah's witnesses from the foregoing wrongs, injuries and irreparable damage committed against them by defendants, and in order properly to safeguard constitutional rights, civil and property, of all persons for whom this action is brought. The granting of the requested injunction will prevent a multiplicity of suits and actions at law, in which said aggrieved persons for whom this action is brought cannot adequately protect their said rights.

24. That Sections 5 and 9, Article 2, and Section 5-A, Article 8, of Chapter 18 of the Code of West Virginia, 1931, and the regulations thereunder promulgated by said State Board of Education requiring the flag-salute ceremony, are

unconstitutional, null and void AS CONSTRUED AND APPLIED to plaintiffs and all other of Jehovah's witnesses for whom this action is brought, because:

(a) They unreasonably abridge the rights of said parents and children freely to worship Almighty God according to His written law and the dictates of conscience.

(b) They unlawfully force and coerce said children to engage in a religious "rite" or ceremony contrary to their conscientious objection thereto as a condition precedent to enjoyment of fundamental personal rights.

(c) They unlawfully subject said parents and children to cruel and unusual punishment and burdens in that said persons are subjected to criminal prosecution and penalties under the laws prohibiting truancy and delinquency.

(d) They unreasonably abridge the rights of said parents [fol. 13] and children to have the children attend and receive education in free public schools of said State on equal terms with other inhabitants of said State.

(e) They unreasonably restrict said parents in their liberty of choice and direction in the upbringing of their children.

(f) They unreasonably restrict the liberty of the parents freely to impart to their children a knowledge of the commandments of Almighty God as recorded in Holy Writ, which requires said parents to bring their children up "in the nurture and admonition of the Lord".

(g) They unlawfully burden the liberty of said parents and children to maintain a home and enjoy the normal relationship thereof.

25. Each of the above enumerated infringements violates the First Amendment and the "due process" and "equal protection" clauses of the Fourteenth Amendment to the United States Constitution.

26. That Sections 5 and 9, Article 2, and Section 5-A, Article 8, of Chapter 18 of the Code of West Virginia, 1931, and the regulations thereunder promulgated by said State Board requiring the flag-salute ceremony, are unconstitutional, null and void ON THEIR FACE and in excess of the police power because such statutes and regulations have

been superseded by an Act of Congress duly passed and approved June 22, 1942 (Public Law 623, 77th Congress, Chapter 435, Second Session), providing and establishing for use of civilians certain rules and customs pertaining to display and use of and the manner of showing respect to the flag of the United States, Section 7 of which Act is as follows:

[fol. 14] Sec. 7. That the pledge of allegiance to the flag, "I pledge allegiance to the flag of the United States of America and to the Republic for which it stands, one Nation indivisible, with liberty and justice for all", be rendered by standing with the right hand over the heart; extending the right hand, palm upward, toward the flag at the words "to the flag" and holding this position until the end, when the hand drops to the side. HOWEVER, CIVILIANS WILL ALWAYS SHOW FULL RESPECT TO THE FLAG WHEN THE PLEDGE IS GIVEN BY MERELY STANDING AT ATTENTION, men removing the headdress. Persons *in uniform* shall render the military salute.

which said Federal statute is, as to civilians, merely ADVISORY, not MANDATORY, and provides *no penalty*. Any State statute or regulation prescribing a penalty for violating the terms of such Federal statute is in excess of authority, contrary to the statute and void. That by virtue of the foregoing Federal statute all power and authority vested in the respective State governments to promulgate rules and regulations regarding the conduct of persons toward the national flag was automatically ousted and withdrawn from the States by virtue of the passage of said Act of Congress. Therefore the aforesaid West Virginia statutes and regulations are null and void and are in effect repealed by the enactment of said Federal statute. In the event that the Court concludes that said State statutes and regulations have not been entirely annulled and repealed by the passage of said Federal statute, the plaintiffs say that the prescribed flag-salute ceremony for public schools of said State are void because expressly contrary to said Federal statute, which provides that only persons *in uniform* (of the United States Army and Navy) are required to give the military salute or engage in the flag-salute ceremony required by said State statutes and regulations thereunder promulgated by defendant board. Further-

more, said Federal statute does not require a civilian, adult [fol. 15] or child, to give any salute whatsoever to the national flag, and specifically does not require the giving of the salute or participation in the ceremony prescribed by the defendant-board. All that may be lawfully required of any civilian, adult or child, is merely "standing at attention", even though a child be in attendance at a public school in said State. That by reason of the foregoing the said State statutes and regulations thereunder promulgated by said defendant-board are void because in conflict with the United States Constitution and the above Federal statute.

27. That the application and enforcement of said State statutes and flag-salute regulations or any of them, against pupils who conscientiously object to participation in such ceremonial, do not instill love of liberty and democratic principles and devotion to country in the minds of the youth. The giving of the salute does not prove loyalty to the nation because any disloyal person can salute the flag so as to hide his disloyalty. The natural tendency of compelling a conscientious objector to give the salute is to hinder and obstruct loyalty to country because of attempted coercion and oppression of conscience. The enforcement of said statutes and regulations in such manner diminishes respect and increases disrespect for flag and country by inspiring acts of lawlessness and violence against persons who lawfully elect to render obeisance and obedience exclusively to Almighty God, and it provides a means for every adherent of and conniver with the "fifth column" to conceal his true identity. See, in further corroboration of the above matters the booklet "God and the State", copy of which is attached hereto and made a part hereof, marked APPENDIX.

[fol. 16] 28. That the refusal of children of Jehovah's witnesses to salute the flag or otherwise participate in the unlawfully and illegally required flag-salute ceremony does not present a clear and present danger against peaceful, lawful, proper and regular operation of any public school in said State, nor does such refusal present a clear and present danger against the peace of the law-abiding teachers and pupils of any such school. That there is no clear and present danger that any other pupils will refuse to salute the flag unless they become Jehovah's witnesses,

which is most unlikely because of the extreme unpopularity of and persecution now prevailing against Jehovah's witnesses as result of persistent misrepresentation regarding their loyalty to *the government.*

29. That there is nothing in the faith or practices based upon the faith of persons for whom this action is brought that can be claimed to be contrary to morals, health, safety or welfare of the public, the State or the nation.

30. That because constitutionality and validity of State statutes of West Virginia are drawn in question, and because plaintiffs are asking for a preliminary injunction restraining the enforcement of said statutes, plaintiffs are entitled under Section 266 of the Judicial Code (28 U. S. C., Section 380, as amended) to have this Court call a statutory three-judge court consisting of another United States District Judge and a United States Circuit Judge, or to include two United States Circuit Judges, to hear this cause, both on application for preliminary injunction and on final hearing, as provided by law.

31. That plaintiffs allege that the methods for securing a definite ruling in the state courts cannot be pursued with [fol. 17] full protection of the constitutional claims, because one of the plaintiffs, on behalf of all other of Jehovah's witnesses in said State, has three times applied to the Supreme Court of Appeals of the State of West Virginia for a writ of prohibition to have such court construe the regulation and statutes so as to prevent defendants from excluding from the public schools or otherwise punishing children of Jehovah's witnesses who refuse to salute the flag or engage in aforesaid ceremony because of its conflict with their conscientious scruples above described; or to exempt said children from giving the flag salute and from participating in said ceremony or to permit them to stand while others salute and to permit said children to substitute the pledge hereinbefore mentioned for the one required by defendant-board; and said plaintiff in said three applications also requested said court to declare the statutes and regulation unconstitutional under the State and Federal Constitutions. That although said application for writ of prohibition is the appropriate and proper remedy in the state courts to review the question and to protect the constitutional rights of Jehovah's witnesses, the said Supreme Court of Appeals

has declined three times to grant said plaintiff for himself and for other of Jehovah's witnesses the relief requested by them; there is no clear and adequate remedy in the state courts that will dispose of the constitutional questions as speedily as the remedy employed here. There are many hundreds of persons involved in many school districts in all the various counties of the State which will require separate suits or a multiplicity of actions to accomplish the determination here sought in one action for the whole State. There is, therefore, no adequate remedy in the state courts. [fol. 18] Wherefore your plaintiffs offer to make such bond as may be prescribed by the Court, with good and sufficient security to be approved by the Court, and pray as follows:

(A) That a copy of this complaint and the notice of hearing on application for temporary injunction be served upon the Governor and the Attorney General of said State.

(B) That the Court grant and issue an interlocutory or preliminary injunction, after notice to the defendants, restraining each of the above named defendants, their officers, agents, servants and employees, from enforcing said statutes and regulations hereinbefore described as to plaintiffs and all other of Jehovah's witnesses for whom this action is brought, and from excluding from the public schools of said State children of Jehovah's witnesses on account of their refusal to salute the flag or participate in the flag-salute ceremony; and plaintiffs further pray that after calling a three-judge court, this Court, upon a consideration of this complaint, order the application for a preliminary injunction or temporary restraining order above prayed for and contained herein, to be set down at a fixed time and place for hearing before said three-judge statutory court; and that notice issued unto each of the defendants, commanding them to appear at such time and place and show cause, if any they have, why the preliminary or temporary restraining order restraining the defendants, their officers, agents, servants and employees, from enforcing said statutes and regulations as to plaintiffs and other of Jehovah's witnesses should not be granted as prayed for by plaintiffs.

(C) Plaintiffs further pray that upon a final hearing this Court enter an order declaring said above described statutes

[fol. 19] invalid and void under the First and Fourteenth Amendments to the Federal Constitution to which they are contrary as construed and applied to plaintiffs' activities and conduct, and also declaring the regulations promulgated under said statutes void and invalid on their face because they are contrary to and have been superseded by an Act of Congress and because they have been so construed and applied and will be so construed and applied by defendants to deprive plaintiffs and other of Jehovah's witnesses of their right to exercise and enjoy freedom to worship Almighty God in conformity with His written commandments contained in the Bible and in accordance with the dictates of conscience, and their "civil rights" of freedom of speech, of press and of assembly. Plaintiffs further pray that said preliminary injunction be made permanent upon a final hearing, restraining the defendants, their officers, agents, servants and employees from enforcing said statutes and regulations as to plaintiffs and other of Jehovah's witnesses. Plaintiffs further pray for such other and further relief as they may show themselves justly entitled to in the premises.

Hayden C. Covington, per H. S. M., Attorney for Plaintiffs, Office and P. O. Address: 117 Adams St., Brooklyn, N. Y.; Horace S. Meldahl, Attorney for Plaintiffs, Office and P. O. Address: Davidson Bldg., Charleston, W. Va.

* * * * * * *

[fols. 20-21] *Duly sworn to by Horace S. Meldahl. Jurat omitted in printing.*

[fol. 22] Appendix to First Amended Complaint

GOD and THE STATE: your everlasting future hinges on how you decide this interesting issue, at a time when religious-totalitarian dictators put God second, frightening the politicians to cry for union of religion and state. How far may State laws go without encroaching on the claims of God? Should children be punished by the State for putting God first? World developments are forcing all inescapably to a personal decision!

Can you afford to pass by the Scriptural answers and vital information which this booklet presents for your safe guidance to a happy future?

The Publisher.

Author: J. F. Rutherford

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Made in the United States of America

[fol. 23] GOD AND THE STATE

When there is a conflict between two authorities, which one must be obeyed?

The State inflicts punishment upon a person who fails or refuses to obey its law.

One who has agreed to obey God's law and then fails or refuses to obey is subject to punishment by death.

A person conscientiously believes that obedience to a certain law of the State is a flagrant violation of God's law. What shall that conscientious person do?

There is a wide distinction between a person who has made a covenant to do God's will and a person who has not made such a covenant.

Jehovah God requires of His children full obedience as a condition precedent to receiving everlasting life. (Proverbs 7: 1, 2) By His Word He has emphasized that rule from the time of Adam when in Eden until this very day. Adam failed to obey the commandments of Jehovah God, and the result to him was death. The rules of God never change and are the same toward all.—Malachi 3: 6; Acts 10: 34.

Life with the right thereto can be had and maintained only by the grace of God. Life everlasting can be had by those only who are obedient unto God. The word "father" means the one from whom life emanates. God is the Father, therefore, of those who gain life everlasting. He is the fountain of life. (Psalm 36: 9) He gives or administers life everlasting by and through Jesus Christ, His Execu-

tive Officer. "For the wages of sin is death; but the gift of God is eternal life, through Jesus Christ our Lord." (Rom- [fol. 24] ans 6: 23) There is no other possible way of obtaining life. (Acts 4: 12) Christ Jesus is the Beloved Son of God, and he says: "I delight to do thy will, O my God; yea, thy law is within my heart." (Psalm 40: 8) Because of his full and complete obedience unto his Father under the most trying conditions Jesus was given life immortal, the highest place in the universe next to Jehovah, and the administration of Jehovah's will. (Philippians 2: 8-11) Because of his complete obedience Christ Jesus is made "the Author of eternal salvation" to all that obey him. (Hebrews 5: 8, 9) It is of the greatest importance to know these facts, if one would live.

All of the human kind were born in sin because of the sin committed by Adam, and therefore all of his children inherited death. (Romans 5: 12) God has provided redemption and salvation of men from death by and through the sacrifice of the man Jesus unto death. God therefore provides the gift of life to all men who believe on the Lord Jesus Christ as the Savior and who then covenant to be obedient to the laws of God and hence obedient to Christ Jesus: "For as by one man's disobedience many were made sinners, so by the obedience of one shall many be made righteous."—Romans 5: 19.

One becomes a child of God when he exercises faith in God and in Christ Jesus as his Savior, and then agrees to do the will of God, and with him God makes a covenant. The one making the covenant, or who is taken into the covenant with Jehovah God, is then in the way to receive the gift of life. Jehovah's command to his covenant people is (Proverbs 7: 1, 2): "My son, keep my words, and lay up my commandments with thee. Keep my commandments, and [fol. 25] live; and my law as the apple of thine eye." The general rules announced in these texts apply to all men who shall ever gain life everlasting.

COVENANT PEOPLE

Jehovah God chose the Israelites as a "people for his name". In Egypt he made a covenant with that people and confirmed that covenant at Mount Sinai. The people of that nation, through Moses as their mediator, agreed to do whatsoever God commanded of them, and thus they vol-

untarily entered into the covenant. (Exodus 19: 5, 8) As a nation the Israelites broke their covenant and were cast away from God's favor, but there were some individuals who remained faithful unto the covenant. Only those who obeyed God's law, as Christ Jesus always does, were preserved unto life.

When the man Jesus became thirty years of age he presented himself to God and submitted to baptism in the Jordan, thus giving outward testimony that he had entered into a covenant with his Father by sacrifice. (Luke 3: 21-23) Jesus there became the head and chief of the antitypical spiritual Israelites. His disciples were Israelites by nature, eleven of whom continued faithful, and were taken into the covenant with Christ Jesus for the kingdom of God. Then in due time God began to take out from amongst the Gentiles, or other nations, a people for his name who would follow in the footsteps of Christ Jesus. (Acts 15: 14) Each one thus taken into the covenant must become a footstep follower of Christ Jesus, suffer reproaches like those that came upon Jesus, and be faithful even unto death. Such faithful followers of Christ Jesus are spiritual Israelites, chosen of God to be witnesses unto his name and his Kingdom. Concerning them it is written: "But ye are a chosen generation, a royal priesthood, an holy nation, a peculiar people; that ye should shew forth the praises of him who hath called you out of darkness into his maravellous light; which in time past were not a people, but are now the people of God; which had not obtained mercy, but now have obtained mercy." (1 Peter 2: 9, 10) "Ye are my witnesses," [fol. 26] saith God.—Isaiah 43: 12.

That which was written in the law and in the prophecies applies specifically to all Christians who follow Christ Jesus. Upon this point there is not a possibility of doubt, as it is written: "Now all these things happened unto them [natural Israel] for ensamples; and they are written for our admonition, upon whom the ends of the world are come. Wherefore let him that thinketh he standeth take heed lest he fall. Wherefore, my dearly beloved, flee from idolatry." (1 Corinthians 10: 11, 12, 14) "For whatsoever things were written aforetime were written for our learning, that we through patience and comfort of the scriptures might have hope."—Romans 15: 4.

Such true followers of Christ Jesus are accepted by Jehovah and acknowledged by him as his children or sons,

and these must be obedient to Jehovah God their Father, if they would receive life everlasting.

As children of God they must be obedient to his commandments; otherwise they could not live. To such Jehovah God says: "My son, forget not my law; but let thine heart keep my commandments." (Proverbs 3: 1) "Be thou faithful unto death, and I will give thee the crown of life." (Revelation 2: 10, *Am. Rev. Ver.*) Such are and must be witnesses to Jehovah and bear testimony to his name and to his kingdom, and hence they are called by the Lord Jehovah "My witnesses".—Isaiah 43: 10-12.

The Lord announces his purpose to provide a "great multitude" with the opportunity of life everlasting on earth. (Revelation 7: 9-17) All who compose the "great multitude" must agree to do the will of God, and therefore, exercising faith in the shed blood of Christ Jesus as their Redeemer, must consecrate themselves to do the will of God, and must then serve him and obey the commandments of the Lord. They are commanded to "seek righteousness" and "seek meekness", which means that they must endeavor to learn what is God's will concerning them and then to do that which is righteous by obeying the will of God.—Zep-[fol. 27] haniah 2: 1-3.

DUTY OF PARENTS

To all persons who have agreed to do the will of God he says: "See, I have set before thee this day life and good, and death and evil." (Deut. 30: 15) To his covenant people Jehovah says: "One law and one manner shall be for you, and for the stranger that sojourneth with you." (Num. 15: 16) "Ye shall have one manner of law, as well for the stranger, as for one of your own country; for I am the Lord your God."—Lev. 24: 22.

The "stranger" amongst the typical Israelites pictured those who are now on earth and who covenant to do the will of God and who, if faithful, shall form the "great multitude". Those who form the "great multitude" Jesus designates as his "other sheep", and when these are gathered unto the Lord and given life all shall be of "one fold" under Christ the great Shepherd. (John 10: 16) God's announced purpose is to grant life everlasting to those only who believe on him and on the Lord Jesus Christ and who render themselves in obedience. This rule applies to both

the spiritual Israelites and those of the "great multitude", that is, to all who shall live: "The Father loveth the Son, and hath given all things into his hand. He that believeth on the Son hath everlasting life; and he that believeth not the Son shall not see life; but the wrath of God abideth on him."—John 3: 35, 36.

TEACHING CHILDREN

Marriage and child-bearing are God's arrangement for humankind. All parents who have agreed to do the will of God, and who have children, are bound by the commandments of Almighty God *to teach their children the Word of God and to instruct them in the way of righteousness.* To his consecrated or covenant people Jehovah says: "Only take heed to thyself, and keep thy soul diligently, lest thou forget the things which thine eyes have seen, and lest they depart from thy heart all the days of thy life; but teach them thy sons, and thy sons' sons." (Deuteronomy 4: 9) "And these words, which I command thee this day, shall [fol. 28] be in thine heart: and thou shalt teach them diligently unto thy children, and shalt talk of them when thou sittest in thine house, and when thou walkest by the way, and when thou liest down, and when thou risest up." (Deut. 6: 6, 7) "Observe and hear all these words which I command thee, that it may go well with thee, and with thy children after thee for ever, when thou doest that which is good and right in the sight of the Lord thy God."—Deuteronomy 12: 28.

Addressing himself to his people who are in a covenant to do his will, Jehovah God gives this specific commandment: "Set your hearts unto all the words which I testify among you this day, which ye shall command your children to observe to do, all the words of this law."—Deuteronomy 32: 46.

It cannot properly be said that these laws of God apply only to the ancient Israelites. Exactly the contrary is expressed in God's Word. His law is the same toward all who *seek to live.* Children seek knowledge and must be taught, and it is the desire of all sane persons, both adults and children, to receive life everlasting. Obligation is laid by the Lord upon consecrated parents to see to it that their children are instructed in the law of God. They cannot disregard this obligation and expect God's favor. It is also the

duty of the parents to have their children in subjection and to carefully guide them in the way of righteousness. Upon this point note these words of the Scriptures addressed to the consecrated parents and to their children: "Children, obey your parents in the Lord: for this is right. Honour thy father and mother; which is the first commandment with promise, that it may be well with thee, and thou mayest live long on the earth. And, ye fathers, provoke not your children to wrath; but *bring them up in the nurture and admonition of the Lord.*"—Ephesians 6: 1-4.

Parents are the ones responsible for bringing children into the world, and it is their responsibility to properly instruct those children. The custom amongst the people of all nations of leaving the instruction of children to schools, [fol. 29] presided over by persons as teachers, is man's way, but it is not God's way. Parents cannot escape their obligation laid upon them by the Lord by leaving the instruction of their children to others. In matters pertaining to worldly affairs it seems that instruction of children by a competent teacher in the schools is proper, but as to the Word of God it is the first and bounden duty of consecrated parents to teach their children. That instruction must be given in the manner God has commanded. The consecrated parents must bring up their children "in the nurture . . . of the Lord"; which means as God has commanded. They must bring them up in the "admonition of the Lord"; which means that advice, counsel and instruction must be given to them in righteousness, as that instruction is set forth in the Word of God, the Bible. This is a sacred duty that no one has any right to interfere with and a duty that the parents have no right to ignore.

Life for the child is involved, and hence it is of great importance to the child that it be taught in the right way, that is, God's way. Otherwise it can never obtain life everlasting. Concerning this it is written in God's Word: "Train up a child in the way he should go; and when he is old, he will not depart from it."—Prov. 22: 6.

The foundation of the child's education must be laid in the Word of God, because that is the only way that leads to life everlasting. By nature a child's mind seeks information or knowledge. Only those persons who seek the way to life as the Lord has pointed out in his Word shall ever find it. This was emphasized by the Lord Jesus. Little

children were being brought to Jesus by their parents that they might learn of him, and the religious-minded tried to prevent the children from being brought to Jesus: "But when Jesus saw it, he was moved with indignation, and said unto them, Suffer the little children to come unto me; forbid them not; for to such belongeth the kingdom of God. Verily I say unto you, Whosoever shall not receive the kingdom of God as a little child, he shall in no wise enter therein. [fol. 30] And he took them in his arms, and blessed them, laying his hands upon them." (Mark 10: 14-16, *A. R. V.*) By these words the Lord clearly meant that those persons *who seek knowledge from him*, as the little children were seeking, can find the way of life; that the kingdom of God is for those and those only who seek the knowledge of truth found in God's Word and who then obey by doing what the Lord commands. It would be impossible to make it more emphatic concerning the obligation to teach the children, from their youth up, than what God has put in his Word.

COMMANDMENTS

The obligation upon the parents begins to be specially binding only after they have made a covenant to do the will of God and have been taken into a covenant with Jehovah God. Parents who are in a covenant to do the will of God must then inform themselves of his will or commandment toward themselves and toward their children, and then must obey those commandments and teach the same to their children, and admonish their children to obey. The state or nation, through its rules of education, has no right whatsoever to limit, interfere with, or hinder the instruction by parents of their children in the Word of God. By one inquiring how one might obtain eternal life by obeying God's commandments the question was propounded to Jesus: "Which is the great commandment in the law? Jesus said unto him, Thou shalt love the Lord thy God with all thy heart, and with all thy soul, and with all thy mind. This is the first and great commandment. And the second is like unto it, Thou shalt love thy neighbour as thyself. On these two commandments hang all the law and the prophets."—Matt. 22: 36-40.

To love God means that the person must be wholly and unselfishly devoted to Almighty God, seeking always to know and to do the will of God. This is well defined by the

words of Jesus addressed to Jehovah God: 'I delight to do thy will, O my God; thy law is written in my heart.' (Psalm 40:8) "Neighbour," within the meaning of the Scriptures, [fol. 31] is one's fellow creature who is also a believer on Jehovah and Christ, and who has agreed to do the will of God. God's commandment requires that 'one love his neighbor, even as he loves himself', that is to say, puts his brother Christian on an exact equality with himself. The only way a person can prove his love for God is by fully and sincerely obeying the commandments of God; as it is written. "If ye love me, keep my commandments." (John 14:15) The Christian proves his love for God by joyfully obeying God's commandments. (1 John 5:3) Where the commandments of men are in conflict with God's commandment there is but one thing to do, and that is, to OBEY GOD FIRST.

ONE GOD

There is one God Eternal, The Almighty, whose name is Jehovah. (Ps. 83:18) He is "from everlasting to everlasting", and from him proceeds everything that is good. (Ps. 90:2; Jas. 1:17) All the ways of God are perfect. (Deut. 32:4) God's commandments are perfect, and if a man could at all times deport himself exactly in harmony with God's law he would never make a mistake: "The law of the Lord is perfect, converting the soul: the testimony of the Lord is sure, making wise the simple: the statutes of the Lord are right, rejoicing the heart; the commandment of the Lord is pure, enlightening the eyes: the fear of the Lord is clean, enduring for ever: the judgments of the Lord are true and righteous altogether."—Ps. 19:7-9.

Jehovah God is the fountain of life and the Giver of life everlasting to them that obey him. (Ps. 36:9) Necessarily it follows that, if man makes some creature or thing a god to which he renders obeisance and obedience, it is written, he could never find or possess life everlasting. By reason of the goodness and loving-kindness of Almighty God this unchangeable commandment is given to all who have hope of life everlasting, to wit:

"Thou shalt have no other gods before me. Thou shalt not make unto thee any graven image, or any likeness of any thing that is in heaven above, or that is in the earth [fol. 32] beneath, or that is in the water under the earth;

thou shalt not bow down thyself to them, nor serve them; for I the Lord thy God am a jealous God, visiting the iniquity of the fathers upon the children unto the third and fourth generation of them that hate me."—Exodus 20:3-5.

The people who resided in Palestine at the time God sent his covenant people, the Israelites, there were worshipers of gods or demons; and in order to safeguard his covenant people from such demon-worship God commanded them that they should have nothing to do with other gods, lest they be ensnared by such. Again God emphasized this law or commandment to his covenant people by saying to them: "Neither shall thou serve their gods; FOR THAT WILL BE A SNARE UNTO THEE." (Deuteronomy 7:16) His commandment further emphasized his instruction that his covenant people must have nothing to do with GRAVEN IMAGES or even have a desire for them. "The graven images of their gods shall ye burn with fire; thou shalt not desire the silver or gold that is on them, nor take it unto thee, LEST THOU BE SNARED THEREIN: for it is an abomination to the Lord thy God."—Deuteronomy 7:25.

God, being the Fountain of life, and the only source of life, and life being granted upon condition of obedience, it was his great loving-kindness that provided for the protection of his covenant people by commanding them to refrain completely from giving any worship to any creature or thing. The Israelites violated the covenant of God and became ensnared, and that nation was destroyed. (Psalm 106:36, 40; Ezekiel 21:24-27) Thus God emphasized his unchangeable rule that a willful disobedience to his commandments means death to the creature or nation.

CHRISTIAN

A Christian is one who follows in the footsteps of Jesus Christ and joyfully obeys the commandments of Almighty God. All Christians must follow in the footsteps of Jesus Christ. (1 Peter 2:21) There is a wide difference between persons who have not made a covenant with the Lord and [fol. 33] those WHO HAVE COVENANTED to do his will. Those who enter into an agreement or covenant to be obedient to God, and who are accepted by him as followers of Christ Jesus, are entirely separate and distinct from others in the world. At the end of his earthly ministry Jesus uttered

these words, addressed to Jehovah God and concerning those who agree to follow in his steps, to wit: "I have given them thy word; and the world hath hated them, because they are not of the world, even as I am not of the world. I pray not that thou shouldest take them out of the world, but that thou shouldest keep them from the evil. THEY ARE NOT OF THE WORLD, even as I am not of the world. SANCTIFY THEM THROUGH THY TRUTH; THY WORD IS TRUTH."—John 17:14-17.

For centuries Satan has been the invisible ruler or "god of this [wicked] world". (2 Cor. 4:4; 1 John 5:19; John 14:30) Only those who have strictly obeyed the Lord's commandments have been saved from the influence and power of Satan the Devil. For this reason the faithful followers of Christ Jesus are instructed to 'keep yourselves unspotted from the world'. (Jas. 1:27) It follows, therefore, that rules that nations make concerning their people in general cannot always apply to the one who is in a covenant to do God's will.

All true and faithful followers of Christ Jesus are and indeed must be witnesses to Jehovah by declaring his name and his kingdom under and by Christ Jesus. (Isa. 43:10-12; Ex. 9:16) All such covenant people must preach the gospel of God's kingdom in obedience to his commandments. (Isa. 61:1, 2; Matt. 24:14) All persons thus devoted to God and his kingdom must TEACH THEIR CHILDREN the gospel of THE THEOCRACY or Kingdom. Jesus specifically instructed his followers to continuously pray to God: 'Thy kingdom come; thy will be done, on earth as in heaven.'—Matt. 6:10.

RELIGION AND CHRISTIANITY

Indulging in any ceremony or practice whatsoever contrary to the commandment of God is religious. Religion originated with the demons, of which Satan is the chief. It has at all times been used to ensnare and has ensnared multitudes of people and kept them blind to God's will or commandment. Religion has been the moving influence for the persecution and violent treatment of others, and particularly the persecution of Christians. [fol. 34]

Christians are those who do the will of God as commanded in his Word. They are called "Christians" because Christ Jesus is always obedient to God's will and he is the Head and Leader of all who are diligent to obey God's command-

ments. Christians are therefore commanded by the Lord to avoid anything and all things that are contrary to God's commandments.

SUPREME

The Word of Jehovah God, as expressed in the Bible, is His law, given to man for his correct guide: "Thy word is a lamp unto my feet, and a light unto my path." (Psalm 119:105) The law of God is supreme and is the only instruction that man can receive and be equipped to walk in the way of righteousness and life. "Every scripture inspired of God is also profitable for teaching, for reproof, for correction, for instruction which is in righteousness; that the man of God may be complete, furnished completely unto every good work."—2 Timothy 3:16, 17, *Rev. Ver.*

Every Christian is bound by his covenant to be obedient to God's law, as written in the Scriptures. If he voluntarily breaks the terms of his covenant he is subject to death. (Rom. 1:31, 32) All Christians conscientiously believe that the Word of God, as recorded in the Bible, is the truth; and if they willingly violate their conscientious belief, such act constitutes the breaking of their covenant. To CAUSE A CHRISTIAN TO VIOLATE HIS CONSCIENCE is denounced by the Scriptures as "SIN AGAINST CHRIST". (1 Cor. 8:12) These general rules stated in the Bible apply to all persons who believe on God and on Christ and who start to walk in the way of righteousness that leads to life everlasting.

CONSCIENCE

In forming the United States government the law-makers were careful to safeguard the conscience of men, particu- [fol. 35] larly concerning the worship of Almighty God. That part of the Constitution known as the Bill of Rights guarantees to all citizens the right to freely exercise the conscience relative to belief or non-belief, worship or non-worship. Almost all the state constitutions provide that all men shall be free to exercise their conscientious belief and to practice the same without interference unless that practice endangers the welfare of others. As an illustration: William Penn refused to remove his hat when entering the presence of others because he conscientiously believed that such would be a violation of God's commandment; and for that he was punished. Penn had much to do with framing the Constitution of the Commonwealth of

Pennsylvania, and especially with reference to the freedom of the exercise of conscientious worship. The highest court of that Commonwealth, discussing the principles of liberty of conscience, said: "Liberty necessarily embraces the right of the individual to exercise his conscience and THAT WITHOUT INTERFERENCE. That includes the right to worship the Supreme Being according to the dictates of his own conscience; to adopt any creed or hold any opinion whatsoever on the subject of religion; and TO DO or FORBEAR TO DO ANY ACT FOR CONSCIENCE' SAKE, the doing or the forbearing of which is not prejudicial to the public weal."—Commonwealth *v.* Lesner, 17 S. & R. 155.

The Supreme Court of the United States, in the case of Church *v.* United States, 143 U. S. 457, held that God is supreme and that America is a Christian nation. Leading law-writers of the nations of the world called "Christendom" have said, concerning the supremacy of the law of Almighty God, this, to wit: "It is binding over all the globe, in all countries, at all times No human laws are of any validity if contrary to this [God's law]; and such of them as are valid derive all their force and all their authority, mediately or immediately, from the original. The revealed or divine laws are to be found only in the Holy Scriptures. No human law should be suffered to contradict [fol. 36] this."—*Blackstone Commentaries*, Chase 3d Edition, pages 5-7.

"No external authority is to place itself between the finite being and the Infinite when the former is seeking to render homage that is due, and in a mode which commends itself to HIS CONSCIENCE and judgment as being suitable to him to render, and acceptable to its object."—Cooley's *Constitutional Limitations*, 8th Edition, page 968.

VIOLATION

In more recent years irreverent persons, who have no respect for the supreme law of God, and who have no faith in God or in Christ, have taken the lead in public affairs and in lawmaking. Such men, ambitious to appear as the acclaimed guardians of the public welfare, have conceived the idea of compelling school children to indulge in a fixed ceremony of saluting the flag. The idea appeared to be good to others who give no heed to God's Word, and soon school boards began to make rules compelling all the chil-

dren to indulge in such ceremony. This has developed until now there is a general hysteria abroad in the land, which has led to the punishment of children by ill-treating and by expelling them from school because they conscientiously decline to indulge in the religious ceremony of saluting any flag. Such children have been taught by their parents to obey God, and, because they obey their parents and obey God, the children are expelled from school and their parents are punished for not compelling their children to violate their conscience and to violate the law of Almighty God. This modern ceremony of "heiling" men and saluting flags first became prominent in modern times in the arbitrary government of Germany, the purpose of which is to put the state above God.

If boards of public education believed in Jehovah as the Almighty God and in Christ Jesus as the Savior of men, and that God's law is supreme, they would never attempt to compel any child to violate its conscience by saluting any flag or bowing down to any creature or thing. Boards of [fol. 37] education in the United States in recent years have shown a zeal in the one direction of attempting to instill patriotism in children, and in this they have completely ignored God's Word. The words of Mr. Justice Brandeis, late of the Supreme Court of the United States, are here quite appropriate, to wit: "The greatest dangers to liberty lurk in insidious encroachment by men of zeal, well meaning, but without understanding."—Olmstead *v.* United States, 277 U. S. 479.

In the time of the apostles there were religionists of the same category as above mentioned, and concerning which the apostle wrote: "For I bear them record that they have a zeal of God, but not according to knowledge. For they being ignorant of God's righteousness, and going about to establish their own righteousness, have not submitted themselves unto the righteousness of God. For Christ is the end of the law for righteousness to every one that believeth."—Romans 10:2-4.

The wrong is not in the flag, because the flag of the United States is the symbol of liberty and justice. The wrong is not in the salute, but, as to a conscientious Christian, the wrong lies in compelling or attempting to compel that one, against his conscience, to violate God's specific commandment. As above stated, God has specifically emphasized his law, that no form of worship or reverence shall be given to

any creature or thing, and to attempt to compel a person to violate his conscience and to violate God's commandment is absolutely wrong.

DEFINITIONS

According to the authoritative definitions, the saluting of the flag is a religious ceremony which gives reverence and worship, contrary to God's law. These definitions are given as follows, to wit:

"The flag, like the cross, is sacred. * * * The rules and regulations relative to human attitude toward national standards use strong, expressive words, as, 'Service to the Flag,' * * * 'Reverence for the Flag,' 'Devotion to the Flag.'—*The Encyclopedia Americana*, Vol. 11, page 316.

SACRED means "set apart by religious ceremony". [fol. 38]. DEVOTION means "a form of prayer or worship". —Webster.

REVERENCE means "veneration, expressing reverent feeling, worship".

SALUTE means "to greet with a kiss, to bow and courtesy, the uncovering of the head, a clasp or wave of the hand or the like * * * to honor formally or with ceremonious recognition". (*Century Dictionary*, page 5321) "To greet with a sign of welcome, love or deference, as a bow and embrace, or a wave of the hand."—Webster.

Under the word "image" this definition is given by Webster's Dictionary: "Image, in modern usage, commonly suggests RELIGIOUS VENERATION."

According to the Bible, 'Bow down to a symbol or image' includes all postures or attitudes toward the image, even a kiss. (See 1 Kings 19:18; Hosea 13:2; Job 31:25-27.)

Thus worldly lexicographers recognize the saluting of a flag as A RELIGIOUS FORMALISM. According to the Bible there cannot be the slightest doubt about it, because by such salute there is bestowed upon the image or thing reverence, devotion, a form of prayer or worship, and which thing, or image of that which it represents, is regarded as SACRED.

Non-Christians may salute the flag without reference to the foregoing rules. Those who are real conscientious Christians are in a class entirely different from others of

the world. Jehovah's witnesses are Christians and in a covenant to be entirely obedient to God's law. They must teach their children and admonish them to obey *God's* law, as he has commanded. They are conscientious and they sincerely believe that for them to indulge in the formalism or ceremony of saluting any flag is a violation of God's specific commandment as set forth at Exodus 20:3-5 and emphasized in many other scriptures. The reason that such flag saluting is a violation of that commandment is that the salute attributes salvation to the state, which the flag represents, thus making the state a mighty one, or a "god", [fol. 39] whereas 'salvation belongeth alone to Jehovah, the Almighty God', and to none other. (Ps. 3:8) Jehovah's witnesses conscientiously and sincerely believe the Word of God and that their violation of their conscience and the violation of God's commandment would mean their certain destruction; as it is written: "For Moses truly said unto the fathers, A prophet shall the Lord your God raise up unto you of your brethren, like unto me; him shall ye hear in all things whatsoever he shall say unto you. And it shall come to pass, that every soul, which will not hear that prophet, shall be destroyed from among the people." —Acts 3:22,23.

Children who have been reared and taught in the nurture and admonition of God's law and who, because they are in a covenant to do God's will and conscientiously attempt to obey God, refuse to indulge in the ceremony of saluting any flag and for that reason are expelled from school and denied the right of education, what shall they do? The parents of those children, who have obeyed God's law to bring up their children "in the nurture and admonition of the Lord", are punished because they do not compel their children to violate their conscience and to violate God's law, and the parents are deprived of their liberty and right to have their children educated in the schools, as the law requires. What shall they do? Many children and many parents in the United States find themselves confronted with this important question.

Members of the boards of education have the responsibility of answering those questions. Let the members of the boards of education ask themselves this question: If I had made a consecration to God, and entered into a covenant to do His will, and conscientiously believed that the Word of God is supreme and that His Word forbids me to

indulge in flag saluting, what would I do if an attempt were made to compel me to violate my conscience and to violate God's law? Would I refuse to comply with man-made rules and suffer punishment at the hands of men, or would I break my covenant with God and suffer everlasting punishment [fol. 40] by destruction at the hand of God? These are serious questions and fraught with great weight. Every person must either choose to be obedient to God's commandment or choose to take a contrary course.

GOD FORGOTTEN

Most of the men who had to do with laying the foundation of the American government believed in God and relied upon His Word; but in recent years there has been a rapid falling away from faith in God and in the Bible, particularly so amongst those who have to do with governmental or public affairs. Today many of the lawyers and judges of the courts, as well as other public officials, entirely ignore the Word of God. There are some lawyers, however, who firmly hold to the fundamental principles relied upon by the nation, and who trust in God, and who believe that every man should be free to exercise his conscientious reverence and worship of God without interference and that the conscientious and sincere belief of all should be respected and not interfered with. More than one hundred years ago the courts of America laid down the rule that the INDIVIDUAL ALONE IS PRIVILEGED TO DETERMINE WHAT HE SHALL AND SHALL NOT BELIEVE, and that the COURTS HAVE NO RIGHT TO INTERFERE WITH BELIEF OR PRACTICE, except when the practice endangers the welfare of others. In 1784 Thomas Jefferson introduced in the Virginia legislature a bill which he had prepared, the preamble of which, written by him, reads as follows: "That to suffer the civil magistrate to intrude his powers into the field of opinion, and to restrain the profession or propagation of principles on supposition of their ill tendency, is a dangerous fallacy which at once destroys all religious liberty, it is declared that it is time enough for the rightful purposes of civil government for its officers to interfere when principles break out into overt acts against peace and good order."

The Gobitis case, which originated in Pennsylvania, aptly illustrates the point with reference to forgetting or ignoring God. The Gobitis parents are conscientious Christians, in a

[fol. 41] covenant to do the will of Almighty God. They have brought up their children as commanded by the Scriptures, "in the nurture and admonition of the Lord." The children also consecrated themselves to God and entered into a covenant to do his will. The school board promulgated a rule requiring a daily practice of saluting the flag, and going through a certain ceremony in connection therewith. The Gobitis children, because of their conscientious belief that such flag saluting would be a violation of their covenant and a violation of God's law, asked to be excused therefrom and to remain silent during the ceremony. For this they were expelled from school. Suit was begun in the United States District Court, presided over by Judge Maris. That court held that the flag-salute rule could not be enforced against the Gobitis children because of their conscientious belief in God and His Word, and in his Opinion, amongst other things, he said: "In these days, when religious intolerance is again rearing its ugly head in other parts of the world, it is of the utmost importance that the liberties guaranteed to our citizens by the fundamental law be preserved from all encroachment."

In that Opinion Judge Maris quoted from the Opinion of Justice Gibson, rendered in the Lesher case, and further said: "In these words that eminent jurist [Justice Gibson] clearly stated that the principle which underlies the Constitutional provision of the state, and which is one of the fundamental bases upon which our nation was founded, namely, that individuals have the right not only to entertain any religious belief but also TO DO OR REFRAIN FROM DOING ANY ACT ON CONSCIENTIOUS GROUNDS, which does not prejudice the safety, morals, property or personal rights of the people. * * * On the contrary, that regulation [of the School Board], although undoubtedly adopted from patriotic motives, appears to have become in this case a means for the persecution of children for conscience' sake. Our beloved flag, the emblem of religious liberty, apparently has [fol. 42] been used as an instrument to impose a religious test as a condition of receiving the benefits of public education."

On appeal the United States Circuit Court of Appeals affirmed the judgment of the District Court. The case was then appealed to the Supreme Court of the United States, and there the judgments of the lower courts were reversed. The majority Opinion in that case DID NOT hold that citizens

can be compelled to salute the flag, but did hold that the board of education may make and enforce rules compelling children to indulge in the ceremony of flag saluting. The real issue was side-stepped. It is manifest that the writer of that Opinion does not believe in and rely upon God and Christ, but that he is controlled by science and public opinion. The first paragraph in that majority opinion says: "A grave responsibility confronts this Court whenever in course of litigation it must reconcile the conflicting claims of liberty and authority. But when the liberty invoked is liberty of conscience, and the authority is authority to safeguard the nation's fellowship, judicial conscience is put to its severest test. Of such a nature is the present controversy."

The court further in that opinion ruled that the responsibility is upon SCHOOL BOARDS OR BOARDS OF EDUCATION, and NOT UPON THE COURTS, to determine what rules shall be made and enforced. Further discussing the matter, the opinion says: "The influences which help toward a common feeling for the common country are manifold. Some may seem harsh and others no doubt are foolish. Surely, however, the end is legitimate. And the effective means for its attainment are still so uncertain and so unauthenticated by science as to preclude us from putting the widely prevalent belief in flag-saluting beyond the pale of legislative power."

"The wisdom of training children in patriotic impulses by those compulsions which necessarily pervade so much of the educational process IS NOT FOR OUR INDEPENDENT judgment. Even were we convinced of the folly of such a measure, such belief would be no proof of its unconstitutionality. [fol. 43] For ourselves, we might be tempted to say that the deepest patriotism is best engendered by giving unfettered scope to the most crochety beliefs. Perhaps it is best, even from the standpoint of those interests which ordinances like the one under review seek to promote, to give to the least popular sect leave from conformities like those here in issue. But the COURT ROOM IS NOT THE ARENA FOR DEBATING ISSUES OF EDUCATIONAL POLICY. It is not our province to choose among competing considerations in the subtle process of securing effective loyalty to the traditional ideals of democracy, while respecting at the same time individual idiosyncrasies among a people so diversified in racial origins and religious allegiances. So to hold would in effect

MAKE US THE SCHOOL BOARD FOR THE COUNTRY. THAT AUTHORITY HAS NOT BEEN GIVEN TO THIS COURT, nor should we assume it."

"Judicial review, itself a limitation on popular government, is a fundamental part of our constitutional scheme. But to the legislature no less than to courts is committed the guardianship of deeply-cherished liberties. Where all the effective means of inducing political changes are left free from interference, education in the abandonment of foolish legislation is itself a training in liberty. To fight out the wise use of legislative authority in the FORUM OF PUBLIC OPINION and before LEGISLATIVE ASSEMBLIES rather than to transfer such a contest to the judicial arena, serves to vindicate the self-confidence of a free people."

A minority Opinion was also rendered and filed in that case, and the learned Justice who differed from the majority Opinion, amongst other things, said: "The Constitution may well elicit expressions of loyalty to it and to the government which it created, but it does not command such expressions or otherwise give any indication that compulsory expressions of loyalty play any such part in our scheme of government as to override the constitutional protection of freedom of speech and religion. And while such expressions of loyalty, when voluntarily given, may promote national unity, it is quite another matter to say that [fol. 44] their compulsory expression by children in violation of THEIR OWN and THEIR PARENTS' religious convictions can be regarded as playing so important a part in our NATIONAL UNITY AS TO LEAVE SCHOOL BOARDS FREE TO EXACT IT DESPITE THE CONSTITUTIONAL GUARANTEE OF FREEDOM OF RELIGION. The very terms of the Bill of Rights preclude, it seems to me, any reconciliation of such compulsions with the constitutional guaranties by a legislative declaration that they are more important to the public welfare than the Bill of Rights.

"But even if this view be rejected and it is considered that there is some scope for the determination by legislature whether the citizen shall be compelled to give public expression of such sentiments contrary to his religion, I am not persuaded that we should refrain from passing upon the legislative judgment 'as long as the remedial channels of the democratic process remain open and unobstructed.' This seems to me no more than the surrender of the con-

stitutional protection of the liberty of small minorities to THE POPULAR WILL. * * *

"The Constitution expresses more than the conviction of the people that democratic processes must be preserved at all costs. It is also an expression of faith and a command that freedom of mind and spirit must be preserved, which government must obey, if it is to adhere to that justice and moderation WITHOUT WHICH NO FREE GOVERNMENT CAN EXIST. For this reason it would seem that legislation which operates to repress the religious freedom of small minorities, which is admittedly within the scope of the protection of the Bill of Rights, must at least be subject to the same judicial scrutiny as legislation which we have recently held to infringe the constitutional liberty of religious and racial minorities.

"With such scrutiny I cannot say that the inconveniences which may attend some sensible adjustment of school discipline in order that the religious convictions of these children may be spared, presents a problem so momentous or [fol. 45] pressing as to outweigh the freedom from compulsory violation of religious faith which has been thought worthy of constitutional protection."

The majority Opinion in the Gobitis case ignores the supremacy of God's law, declines to exercise its authority under the Constitution to restrain the infringement upon liberty properly exercised and which is guaranteed by the Bill of Rights, and shifts the burden upon BOARDS OF EDUCATION AND ADVISES FIGHTING IT OUT IN THE PUBLIC FORUM.

RESULT

Welfare and stability of the nation depend not upon ceremonies, such as saluting a flag, but do depend upon recognizing Jehovah God as supreme. Criminals salute the flag upon all occasions and then straightway violate the law of which the flag is a symbol.

The result of the majority Opinion in the Gobitis case breaking down the Constitutional guarantee of liberty of worship, and ignoring God's law, was seized upon as an excuse for immediate violent action against sincere Christians. It was like a lighted match applied to a field of dry grass. In communities dominated by the Catholic Hierarchy, who lead men that are controlled neither by law nor by reason, and where "Catholic Action" is rampant,

Catholic priests led fanatical or demonized mobs that assaulted, abused and ill-treated hundreds of Jehovah's witnesses merely because these witnesses remained faithful and true to God in declaring and obeying His Word. These mobs abused and ill-treated men, women and children, destroyed their property; drove them from their homes; burned their houses; burned their books; burned their money, and tied groups of them together, forced castor oil down their throats, herded them like wild beasts and drove them through the land; and committed numerous other deeds of wickedness against sincere Christians, and continue to do so to this day. Public officials, yielding to the influence of Catholic priests, broke into homes of private citizens, kidnaped and carried them from one state to [fol. 46] another, broke up their private meetings in the study of the Bible, burned their furniture and their literature. Sincere lawyers called upon the attorney-general frequently to invoke the law of the land against such lawless elements, and received promises that this would be done, but more than six months has passed and no action has been taken whatever against lawless mobs of this nature. The harsh, arbitrary, totalitarian-gestapo methods have rapidly spread throughout the United States since the rendering of that Opinion. Public opinion thus expressed in lawlessness, instead of instilling patriotism, has induced even greater lawlessness, and mobs continue to assault Christian people without any just cause or excuse. School boards in many of the states continue to expel children from school and to ill-treat them and their parents because the parents and children ask to be permitted to conscientiously obey the law of Almighty God without interference. Freedom of speech, and freedom of worship, are therefore rapidly disappearing in America. The nation is entirely forgetting God. Appropriate here for consideration are the forceful words of Mr. Justice Sutherland, late of the Supreme Court of the United States, to wit: "Do the people of this land—in the providence of God, favored, as they sometimes boast, above all others in the plenitude of their liberties—desire to preserve those so carefully protected by the First Amendment; liberty of religious worship * * *? If so, let them withstand all BEGINNINGS of encroachment. For the saddest epitaph which can be carved in memory of a vanished liberty is that it was lost because its possessors

failed to stretch forth a saving hand while yet there was time."

If boards of education and other legislative bodies, and the nation in general, continue to ignore the law of God and to punish innocent children and parents because such conscientiously give heed to and obedience to the Word of God, what will be the end thereof? Can a nation once acknowledging itself to be "Christian", a nation that has based its fundamental law upon the law of God and recognized that [fol. 47] the law of God is supreme, and which nation then forgets God and ignores his law, expect to continue to exist? Let the Word of God give the answer to that question: "The wicked shall be turned into hell, and ALL THE NATIONS THAT FORGET GOD."—Psalm 9:17.

Will Almighty God excuse or pass by unnoticed those who directly or indirectly inflict punishment upon children and their parents for exercising their conscientious belief in obedience to God's law? Will Almighty God avenge his covenant people, whom he has selected to serve him? The answer is found in the words of Jesus, to wit: "And shall not God avenge his own elect, which cry day and night unto him, though he bear long with them? I tell you that he will avenge them speedily. Nevertheless, when the Son of man cometh, shall he find faith on the earth?"—Luke 18:7, 8.

LOYALTY

"Loyalty" means to be obedient to the law. Anyone who attempts to take the law into his own hands and compels others to obey it is lawless. Duly constituted authorities may make and enforce laws that are consistent with the supreme law. Should not all citizens be loyal to the country in which they reside? Yes, in harmony with and consistent with God's law, they should obey the laws of the land. Jesus Christ stated the rule by which all Christians must be governed: "Render to Caesar the things that are Caesar's, and to God the things that are God's."—Mark 12:17.

Necessarily that means obedience to God's law or commandments is first, and then obedience to the laws of the state that are not contradictory to God's law. Jesus emphatically stated the supremacy of God's law, and all HIS FOLLOWERS must abide thereby.

God commands his servants that they shall not give reverence, devotion or worship to any image or thing. No human authority can rightfully compel the doing of that which God's law forbids. If the child of God conscientiously believes that the flag-salute ceremony is a violation of God's law, and for that reason asks to be excused from indulging [fol. 48] in such ceremony, no human authority can rightfully interfere with the exercise of the conscience of that person who is devoted to Almighty God.

Jehovah's witnesses, being devoted followers of Christ Jesus, gladly obey all laws of the state or nation that are not in conflict with God's laws and commandments. This they do, not because of compulsion, but because such is right. That they may show their devotion to Almighty God and at the same time show their respect for the flag and the laws of the nation, all of God's covenant people, both parents and children that have agreed to be obedient to God, do willingly make and subscribe to the following pledge, to wit:

"I have pledged my unqualified allegiance and devotion to Jehovah, the Almighty God, and to His Kingdom, for which Jesus commands all Christians to pray.

"I respect the flag of the United States and acknowledge it as a symbol of freedom and justice to all.

"I pledge allegiance and obedience to all the laws of the United States that are consistent with God's law, as set forth in the Bible."

What honest, sincere and law-abiding person can find objection to that pledge? It places God and the nation in their proper places in the mind of all persons. The tendency will be to cause others to have greater reverence for Almighty God, have greater respect for the nation, and to make of them better citizens. In harmony with this it is written in the Scriptures: "Blessed is the nation whose God is the Lord [Jehovah]." (Psalm 33:12; *Am. Rev. Ver.*) The adoption of such a pledge would be entirely consistent with the course taken by the founders of the American nation. To deny Christian children the right and privilege to publicly make the foregoing pledge in the schools, and to compel them to violate their conscience by saluting the flag, as school boards have done, means that the human authorities of the nation are fighting against God and hence have

forgotten God. The responsibility, therefore, must rest upon the shoulders of those who refuse to recognize the [fol. 49] right of a consecrated Christian to exercise his conscientious belief in and devotion to Jehovah and his Word. Those who oppose Almighty God he declares are wicked, and the fate of such individuals and nations he announces in these words: "The wicked shall be turned into hell, and all the nations that forget God."—Psalm 9:17.

The highest court of the land has shifted the responsibility of compulsory flag-saluting upon boards of education or school boards, manifestly because some members of that court are ashamed to acknowledge Jehovah, the Almighty God, as the Supreme Being. The school boards must now decide whether it is of greater importance to compel children to violate their conscience in order to comply with human rules or to have them obey Almighty God. (Acts 4:19, 20) Which will do the greater amount of good to the people?

A somewhat similar question was before the United States Senate, and that law-making body went on record that the flag of the Papal Hierarchy is above the flag of the United States. The question before the Senate was, Whether the flag of the pope should be displayed during religious services on the ships of the nation above the flag of the United States. A senator from Massachusetts, in his argument before the Senate, took the position that the flag of the pope is the flag of God. In his argument before the Senate he used these words: "I for one refuse to depart from the time-honored American custom of placing the emblem of God above every other emblem of the world. I will not run down the penant of God for any other emblem." The senate, by a vote of 68 to 10, decided that the religious flag of the pope should be displayed above the flag of the United States. That occurred in February, 1929. (See the *Congressional Record* No. 47, page 2851.)

It is entirely inconsistent for the nation and its constituted legal authorities to attempt to compel little children to acknowledge the flag of the United States as above or superior to the specific commandments of Almighty God, [fol. 50] and to then punish such children and their parents because they insist on obeying God rather than men. The nation, by its senators, and previously by its courts, has acknowledged a religious institution as superior to laws of

the land; and even though they did it ignorantly, with stronger reasoning should we acknowledge the commandments of Almighty God as supreme and above the laws of man.

ALTERNATIVE

Two propositions are before the parents and children who are in a covenant to obey Almighty God:

(1) Participate in the prescribed ceremony of saluting the flag, even though the same be in violation of your conscientious devotion to Almighty God. Penalty for refusing is expulsion from school and additional punishment to the parents.

(2) Render obedience to Almighty God first and obey the rules of the state when such rules are not in conflict with God's commandments. Failure or refusal to do so means punishment at the hand of the Lord by everlasting death.

The person who is in a covenant with God to do his will does not hesitate as to which of these two propositions he will accept. He knows that the most severe punishment the State can inflict upon him is death, from which death God will resurrect his faithful servants who have been put to death by man because of faithfulness to God. He knows that the willful violation of God's commandment means death everlasting, from which there is no resurrection. He prefers to have everlasting life. He follows the advice of Christ Jesus, to wit: "And fear not them which kill the body, but are not able to kill the soul; but rather fear him which is able to destroy both soul and body in hell." (Matthew 10:28) The covenant people of Jehovah God unhesitatingly obey God first and at all times, and implicitly trust him as to the final result.

In taking that course the conscientious children and parents in obedience to God's commandments are following the same course as that taken by the apostles of Christ Jesus. Those faithful men were in a covenant to do God's [fol. 51] will, and, receiving his commandments, they obeyed by going about preaching the gospel. Their action was contrary to the law of the land, as declared by religious Jews. Those faithful men were punished by imprisonment, and yet, as soon as they were released, they straightway went again to publicly preaching the gospel of the Kingdom.

Again they were haled into court, charged with violating the law, and their reply was: "WE OUGHT TO OBEY GOD RATHER THAN MEN." (Acts 5:29) They chose to follow the rule which Jesus had announced. (March 12:17) The Bible records many instances showing God's approval of the course taken by the apostles in rendering full obedience to God rather than obeying men.

The government of Babylon promulgated a law requiring all persons to bow before a certain image. Three of God's typical covenant people were in Babylon. They remembered Jehovah had commanded: 'Thou shalt have no other gods before me; thou shalt not bow down to them nor serve them.' (Exodus 20:3-5) They had respect for the commandments of God. They refused to obey Babylon's command and were told by the highest authority of that nation that they would be put to death by burning. They replied to the law-enforcement body: 'We have no need to obey you in this matter; and if it be that you cast us into the fire, our God, whom we serve, is able to deliver us from the fiery furnace, and he will deliver us.' They were cast into the fiery furnace, which was so hot that it destroyed the men who cast them in, and from that fiery furnace God delivered them, with not even a scorch on their garments. God rewarded their faithfulness.—Daniel 3:15-27.

Daniel, another man in a covenant with God to do His will, was cast into a den of lions because he declined to obey the law of the nation, obedience to which law he conscientiously believed to be idolatry. For his faithfulness God delivered Daniel unharmed.—Daniel 6:1-23.

Over a period of many centuries Satan has caused men [fol. 52] to form conspiracies to kill or otherwise punish faithful servants of Almighty God. The hypocritical ceremony of flag saluting and "heiling" of men originated in Germany, with the Nazis, and is another effort on the part of the Devil to break down faithful devotion to Almighty God by men who have pledged themselves to serve God. That same Satanic, totalitarian rule is attempting to be enforced throughout the nations of the earth. In the United States the people have gotten on for 150 years or more without being compelled to salute flags; and the saluting of flags has never lessened crime. The most enthusiastic flag-wavers in America today are those who have the least respect for the law of man and no respect for the law of God.

On the contrary, Christians respect the flag, and are diligent to obey Almighty God, and they refuse to yield to the Satanic conspirators, and in this they have ample proof of God's approval.

At the eleventh chapter of Hebrews God caused to be recorded a list of faithful men who throughout the ages withstood the unreasonable rules or laws of nations which attempted to break down their devotion to the Almighty God. Those men steadfastly served God in the face of all opposition, and for such faithfulness they suffered cruel punishment at the hands of men. Of them the Lord's Word says: 'The world was not worthy of them.' They all received God's approval for their faithful obedience, and they have the assurance that they shall live forever.—Hebrews 11:1-40.

In the schools children are taught to respect the Constitutional guarantees of liberty of conscience, speech and worship. They should not at the same time be compelled to make hypocrites of themselves by violating those Constitutional guarantees. To compel children to violate God's commandments and their own conscience in order to meet the requirements of some human-made rule is doing violence to the child, and those who enforce such a rule are doing violence to the Lord, as He emphatically declared at Matthew 25:32-46.

[fol. 53] IN UNITED STATES DISTRICT COURT

[Title omitted]

MOTION TO DISMISS—Filed September 14, 1942

The defendants, jointly and severally, move the Court as follows:

1. To dismiss the action because the complaint fails to state a claim against defendants, or any of them, upon which relief can be granted.

2. To dismiss the action because this Court is without jurisdiction over the subject matter alleged in the complaint for the following reasons:

(a) Because the statutes of the State of West Virginia, Section 5, Article 2, and Section 5a, Article 8, Chapter 18

of the Code of West Virginia, 1931, as amended, and the regulations thereunder promulgated by the State Board of Education in the plaintiffs' complaint alleged to be unconstitutional and in violation of the provisions of the Constitution of the United States, are a valid and lawful exercise by the State of West Virginia of its power to determine and regulate the educational policies of the State, and, as a matter of law, do not violate the First Amendment to the United States Constitution, the "due process" and "equal protection" clauses of the Fourteenth Amendment to the [fol. 54] United States Constitution, or any other provisions of the Constitution of the United States, as alleged in the complaint.

(b) Because the complaint presents no substantial controversy arising under the Constitution of the United States and involves no substantial federal question, but goes counter to a decision of the Supreme Court of the United States, handed down on the 3d day of June, 1940, in the case of *Minersville School District, Board of Education of Minersville School District, et al., Petitioners, v. Walter Gobitis, Individually, and Lillian Gobitis and William Gobitis, Minors, by Walter Gobitis, Their Next Friend*, reported in 310 U. S. 586, 84 Law. Ed. 1375, which said decision has in no manner been overruled or modified.

3. To dismiss the action because there is no act of the Congress of the United States which undertakes to legislate or purports to legislate with relation to the matters of the nature alleged in the complaint. What is referred to in the complaint as an "act of Congress (duly passed and approved June 22, 1942, Public Law 623, 77th Congress, Chapter 425, Second Session)" is in fact only a Joint Resolution, being House Joint Resolution 303, and, at most, as stated in the complaint, is "merely advisory, not mandatory," and, as a matter of law, such resolution in no manner and in no degree restricts or limits the power of the states with reference to educational policies.

Wherefore, the defendants pray the judgment of this Court whether they shall further answer, and that they be dismissed with their costs.

Dated: Charleston, West Virginia, September 10, 1942.

W. S. Wysong, Attorney General of the State of West Virginia. Address: The Capitol of West

Virginia, Charleston, West Virginia. Ira J. Partlow, Assistant Attorney General of the State of West Virginia. Address: The Capitol of West Virginia, Charleston, West Virginia, Attorneys for Defendants.

[fol. 55] To Hayden C. Covington, Esq., 117 Adams Street, Brooklyn, New York. Horace S. Meldahl, Esq., Davidson Building, Charleston, West Virginia.

Attorneys for the Plaintiffs:

Please take notice that the undersigned will bring the above motion on for hearing before said Court in the United States courtroom located in the United States Courthouse in the city of Charleston, West Virginia, on the 15th day of September, 1942, at ten o'clock in the forenoon of that day, or as soon thereafter as counsel can be heard.

W. S. Wysong, Ira J. Partlow. Attorneys for Defendants.

[fol. 56] In District Court of the United States, Southern District of West Virginia

No. 242

Walter Barnette, Paul Stull, and Lucy McClure, Plaintiffs,

versus

The West Virginia State Board of Education, Composed of Hon. W. W. Trent, President, Mary H. Davisson, Thelma S. Loudin, Raymond Brewster, Lydia C. Hern, L. V. Thompson, and Mrs. Douglas W. Brown, and all other boards, officials, teachers and persons subject to the jurisdiction and control of said State Board of Education, Defendants.

Final Decree—October 6, 1942

This cause coming on to be heard on motion for interlocutory injunction before the undersigned constituting a District Court of three judges convened according to statute; and being heard upon the bill of complaint, as amended, the motion to dismiss and the arguments of co-nsel; and being submitted for final decree; and the Court having made

findings of fact and conclusions of law, which are filed herewith:

Now, therefore, for reasons set forth in the written opinion herewith filed, it is ordered, adjudged and decreed that the defendants, the West Virginia State Board of Education and the individual members thereof, and all boards, officials, teachers and other persons in any way subject to the jurisdiction of said West Virginia State Board of Education, be, and they are hereby, restrained and enjoined from requiring the children of the plaintiffs, or any other children having religious scruples against such action, to salute the flag of the United States, or any other flag, or from expelling such children from school for failure to salute it; and that plaintiffs recover of defendants the costs of suit to be taxed by the clerk of the court.

Enter: Oct. 6, 1942.

[fol. 57] John J. Parker, U. S. Circuit Judge, Fourth Circuit. Harry E. Watkins, U. S. District Judge for the Northern and Southern Districts of West Virginia. Ben Moore, U. S. District Judge for the Southern District of West Virginia.

[fol. 58] In District Court of the United States, Southern District of West Virginia

No. 242

Walter Barnette, Paul Stull, and Lucy McClure, Plaintiffs,

vs.

The West Virginia State Board of Education, composed of Hon. W. W. Trent, President, Mary H. Davisson, Thelma B. Loudin, Raymond Brewster, Lydia C. Hern, L. V. Thompson, and Mrs. Douglas W. Brown, and all other boards, officials, teachers and persons subject to the jurisdiction and control of said State Board of Education, Defendants

Finding of Fact and Conclusions of Law—October 6, 1942

In the above entitled cause the special court of three judges makes the following findings of fact and conclusions of law:

Findings of Fact

1. That this is a suit to protect rights and privileges guaranteed by the 14th Amendment to the Constitution of the United States and the matter in controversy exceeds the sum or value of $3,000.00.

2. That plaintiffs are citizens of West Virginia and have children who attend the public schools of that state.

3. That plaintiffs and their children are members of a sect known as "Jehovah's Witnesses" and, as such, have conscientious scruples based on religious grounds against saluting the flag of the United States or any other national flag.

4. That the defendant the West Virginia State Board of Education has adopted a regulation requiring children in the public schools of the state to salute the flag of the United States and providing for their expulsion from school upon failure to give such salute.

5. That because of their conscientious scruples based on religious belief, plaintiffs and their children will not comply [fol. 59] with the regulation of the Board of Education requiring the flag salute, and that the Board of Education unless restrained will expel plaintiffs' children from school for failure to comply therewith.

6. That, upon the expulsion of plaintiffs' children from school, they will be deprived of the benefit of education in the public schools to which they are entitled under the laws of West Virginia, and plaintiffs will have to pay to have them educated in private schools or be subject to prosecution under the compulsory education law of West Virginia for failure to send them to schools.

7. That this suit is brought by plaintiffs in behalf of themselves and all other persons similarly situated with respect to the enforcement of the regulation of the Board of Education.

Conclusions of Law

1. That the regulation of the Board of Education, in so far as it requires a flag salute from school children who have conscientious scruples based on grounds of religion against giving such salute, is violative of the rights of re-

ligious liberty guaranteed by the 14th Amendment against infringement by the states.

2. That plaintiffs are entitled to an injunction restraining the State Board of Education, its agents and employees, and all teachers in the schools of the state from requiring plaintiffs' children or the children of other persons for whom the suit is brought, having religious scruples against giving the flag salute, to give such salute or from expelling them from school for failure to give same.

Enter: Oct. 6, 1942.

John J. Parker, U. S. Circuit Judge, Fourth Circuit.
Harry E. Watkins, U. S. District Judge for the Northern and Southern Districts of West Virginia.
Ben Moore, U. S. District Judge, Southern District of West Virginia.

[fol. 50] IN DISTRICT COURT OF THE UNITED STATES, SOUTHERN DISTRICT OF WEST VIRGINIA

WALTER BARNETTE, PAUL STULL, and LUCY MCCLURE, Plaintiffs,

vs.

THE WEST VIRGINIA STATE BOARD OF EDUCATION, composed of Hon. W. W. Trent, President, Mary H. Davisson, Thelma B. Loudin, Raymond Brewster, Lydia C. Hern, L. V. Thompson, and Mrs. Douglas W. Brown, and all other boards, officials, teachers and persons subject to the jurisdiction and control of said State Board of Education, Defendants.

On Motion for Interlocutory Injunction and Submission for Final Decree.

(Argued September 15, 1942)

Before Parker, Circuit Judge, and Harry E. Watkins and Moore, District Judges:

Hayden C. Covington and Horace S. Meldahl, for Plaintiffs, and William S. Wysong, Attorney General of West Virginia, and Ira J. Partlow, Assistant Attorney General of West Virginia, for Defendants.

OPINION—October 6, 1942

[fol. 61] PARKER, Circuit Judge:

This is a suit by three persons belonging to the sect known as "Jehovah's Witnesses", who have children attending the public schools of West Virginia, against the Board of Education of that state. It is brought by plaintiffs in behalf of themselves and their children and all other persons in the State of West Virginia in like situation, and its purpose is to secure an injunction restraining the State Board of Education from enforcing against them a regulation of the Board requiring children in the public schools to salute the American flag. They allege that they and their children and other persons belonging to the sect of "Jehovah's Witnesses" believe that a flag salute of the kind required by the Board is a violation of the second commandment of the Decalogue, as contained in the 20th chapter of the book of Exodus; that because of this belief they cannot comply with the regulation of the Board; that, if they fail to comply, the children will be expelled from school, and thus be deprived of the benefits of the state's public school system; and that plaintiffs, in such event, will have to provide them education in private schools at great expense or be subjected to prosecution for crime for failing to send them to school, as required by the compulsory school attendance law of the state. They contend, therefore, that the regulation amounts to a denial of religious liberty and is violative of rights which the first amendment to the federal Constitution protects against impairment by the Federal government and which the 14th Amendment protects against impairment by the states.

A motion has been made to dismiss the bill on the ground that the regulation of the Board is a proper exercise of power vested in it by the State of West Virginia, and that, under the doctrine of Minersville District v. Gobitis, 310 U. S. 586, the flag salute which it requires cannot be held a violation of the religious rights of plaintiffs. The case was heard on application for interlocutory injunction; but the parties have agreed that it be submitted for final decree on the bill and motion to dismiss. No question is raised as to jurisdiction; and it appears from the face of the bill that the case is one arising under the Constitution of the United States involving, as to each plaintiff, a sum in excess of

$3,000.00, since it is alleged that each of plaintiffs would be required to incur expense in excess of that amount if their [fol. 62] children should be excluded from the public schools. And it seems clear that there is jurisdiction, irrespective of the amount involved, since the suit is for the protection of rights and privileges guaranteed by the due process clause of the 14th Amendment, and jurisdiction is given by Judicial Code Sec. 24(14). Hague v. C. I. O. 307 U. S. 496, 525. There is, therefore, but one question for our decision, viz.: whether children who for religious reasons have conscientious scruples against saluting the flag of the country, can lawfully be required to salute it. We think that this question must be answered in the negative.

Ordinarily we would feel constrained to follow an unreversed decision of the Supreme Court of the United States, whether we agree with it or not. It is true that decisions are but evidences of the law and not the law itself; but the decisions of the Supreme Court must be accepted by the lower courts as binding upon them if any orderly administration of justice is to be attained. The developments with respect to the Gobitis case, however, are such that we do not feel that it is incumbent upon us to accept it as binding authority. Of the seven justices now members of the Supreme Court who participated in that decision, four have given public expression to the view that it is unsound, the present Chief Justice in his dissenting opinion rendered therein and three other justices in a special dissenting opinion in Jones v. City of Opelika — U. S. —, 62 S. Ct. 1231, 1251. The majority of the court in Jones v. City of Opelika, moreover, thought it worth while to distinguish the decision in the Gobitis case, instead of relying upon it as supporting authority. Under such circumstances and believing, as we do, that the flag salute here required is violative of religious liberty when required of persons holding the religious views of plaintiffs, we feel that we would be recreant to our duty as judges, if through a blind following of a decision which the Supreme Court itself has thus impaired as an authority, we should deny protection to rights which we regard as among the most sacred of those protected by constitutional guaranties.

There is, of course, nothing improper in requiring a flag salute in the schools. On the contrary, we regard it as a highly desirable ceremony calculated to inspire in the pupils

a proper love of country and reverence for its institutions. [fol. 63] And, from our point of view, we see nothing in the salute which could reasonably be held a violation of any of the commandments in the Bible or of any of the duties owing by man to his Maker. But this is not the question before us. Admittedly plaintiffs and their children do have conscientious scruples, whether reasonable or not, against saluting the flag, and these scruples are based on religious grounds. If they are required to salute the flag, or are denied rights or privileges which belong to them as citizens because they fail to salute it, they are unquestionably denied that religious freedom which the Constitution guarantees. The right of religious freedom embraces not only the right to worship God according to the dictates of one's conscience, but also the right "to do, or forbear to do, any act, for conscience sake, the doing or forbearing of which is not prejudicial to the public weal". Chief Justice Gibson in Commonwealth v. Lesher 17 Serg. & R. (Pa.) 155.

Courts may decide whether the public welfare is jeopardized by acts done or omitted because of religious belief; but they have nothing to do with determining the reasonableness of the belief. That is necessarily a matter of individual conscience. There is hardly a group of religious people to be found in the world who do not hold to beliefs and regard practices as important which seem utterly foolish and lacking in reason to others equally wise and religious; and for the courts to attempt to distinguish between religious beliefs or practices on the ground that they are reasonable or unreasonable would be for them to embark upon a hopeless undertaking and one which would inevitably result in the end of religious liberty. There is not a religious persecution in history that was not justified in the eyes of those engaging in it on the ground that it was reasonable and right and that the persons whose practices were suppressed were guilty of stubborn folly hurtful to the general welfare. The fathers of this country were familiar with persecution of this character; and one of their chief purposes in leaving friends and kindred and settling here was to establish a nation in which every man might worship God in accordance with the dictates of his own conscience and without interference from those who might not agree with him. The religious freedom guaranteed by the 1st and 14th Amendments means that he shall have the right to do [fol. 64] this, whether his belief is reasonable or not, with-

out interference from anyone, so long as his action or refusal to act is not directly harmful to the society of which he forms a part.

This does not mean, of course, that what a man may do or refrain from doing in the name of religious liberty is without limitations. He must render to Caesar the things that are Caesar's as well as to God the things that are God's. He may not refuse to bear arms or pay taxes because of religious scruples, nor may he engage in polygamy or any other practice directly hurtful to the safety, morals, health or general welfare of the community. See cases cited in Minersville School District v. Gobitis, 3 Cir. 108 F. 2d 683, 689. To justify the overriding of religious scruples, however, there must be a clear justification therefor in the necessities of national or community life. Like the right of free speech, it is not to be overborne by the police power, unless its exercise presents a clear and present danger to the community. Cf. Herndon v. Lowry 301 U. S. 242, where it was said: "The power of a state to abridge freedom of speech and of assembly is the exception rather than the rule and the penalizing even of utterances of a defined character must find its justification in a reasonable apprehension of danger to organized government. The judgment of the legislature is not unfettered. The limitation upon individual liberty must have appropriate relation to the safety of the state." Religious freedom is no less sacred or important to the future of the Republic than freedom of speech; and if speech tending to the overthrow of the government but not constituting a clear and present danger may not be forbidden because of the guaranty of free speech, it is difficult to see how it can be held that conscientious scruples against giving a flag salute must give way to an educational policy having only indirect relation, at most, to the public safety. Surely, it cannot be that the nation is endangered more by the refusal of school children, for religious reasons, to salute the flag than by the advocacy on the part of grown men of doctrines which tend towards the overthrow of the government.

The suggestion that the courts are precluded by the action of state legislative authorities in deciding when rights of religious freedom must yield to the exercise of the police power would, of course, nullify the constitutional guaranty. It would not be worth the paper it is written on, if no legis- [fol. 65] lature or school board were bound to respect it

except in so far as it might accord with the policy they might choose to follow. For the courts to so hold would be for them to abdicate the most important duty which rests on them under the Constitution. The tyranny of majorities over the rights of individuals or helpless minorities has always been recognized as one of the great dangers of popular government. The fathers sought to guard against this danger by writing into the Constitution a bill of rights guaranteeing to every individual certain fundamental liberties, of which he might not be deprived by any exercise whatever of governmental power. This bill of rights is not a mere guide for the exercise of legislative discretion. It is a part of the fundamental law of the land, and is to be enforced as such by the courts. If legislation or regulations of boards conflict with it, they must give way; for the fundamental law is of superior obligation. It is true of freedom of religion, as was said of freedom of speech in Schneider v. State 308 U. S. 147, 161:

"In every case, therefore, where legislative abridgment of the rights is asserted, the courts should be astute to examine the effect of the challenged legislation. Mere legislative preferences or beliefs respecting matters of public convenience may well support regulation directed at other personal activities, but be insufficient to justify such as diminishes the exercise of rights so vital to the maintenance of democratic institutions. And so, as cases arise, the delicate and difficult task falls upon the courts to weigh the circumstances and to appraise the substantiality of the reasons advanced in support of the regulation of the free enjoyment of the rights."

Can it be said by the Court, then, in the exercise of the duty to examine the regulation here in question, that the requirement that school children salute the flag has such direct relation to the safety of the state, that the conscientious objections of plaintiffs must give way to it? Or to phrase the matter differently, must the religious freedom of plaintiffs give way because there is a clear and present danger to the state if these school children do not salute the flag, [fol. 66] as they are required to do? It seems to us that to ask these questions is to answer them, and to answer them in the negative. As fine a ceremony as the flag salute is, it can have at most only an indirect influence on the national

safety; and no clear and present danger will result to anyone if the children of this sect are allowed to refrain from saluting because of their conscientious scruples, however groundless we may personally think these scruples to be. It certainly cannot strengthen the Republic, or help the state in any way, to require persons to give a salute which they have conscientious scruples against giving, or to deprive them of an education because they refuse to give it. As was well said by Chief Justice Lehman of New York in his concurring opinion in People v. Sandstrom 279 N. Y. 523, 18 N. E. 2d 840: "The salute of the flag is a gesture of love and respect—fine when there is real love and respect back of the gesture. The flag is dishonored by a salute by a child in reluctant and terrified obedience to a command of secular authority which clashes with the dictates of conscience."

The salute to the flag is an expression of the homage of the soul. To force it upon one who has conscientious scruples against giving it, is petty tyranny unworthy of the spirit of this Republic and forbidden, we think, by the fundamental law. This court will not countenance such tyranny but will use the power at its command to see that rights guaranteed by the fundamental law are respected. We are not impressed by the argument that the powers of the School Board are limited by reason of the passage of the joint resolution of June 22, 1942, pertaining to the use and display of the flag; but we are clearly of opinion that the regulation of the Board requiring that school children salute the flag is void in so far as it applies to children having conscientious scruples against giving such salute and that, as to them, its enforcement should be enjoined. Injunctive order will issue accordingly.

Injunction Granted.

I concur:

Harry E. Watkins, U. S. District Judge for the Northern and Southern Districts of West Virginia.

I concur:

Ben Moore, U. S. District Judge for the Southern District of West Virginia.

[fol. 67] IN UNITED STATES DISTRICT COURT

[Title omitted]

ORDER ALLOWING APPEAL—Filed October 31, 1942

This cause coming on further to be heard upon the Petition of The West Virginia State Board of Education, composed of W. W. Trent, President, Mary H. Davisson, Thelma B. Loudin, Raymond Brewster, Lydia C. Hern, L. V. Thompson, and Mrs. Douglas W. Brown, for the allowance of an appeal to the Supreme Court of the United States, it is ordered:

That the appeal prayed for is granted; that the amount of the bond for costs on appeal shall be in the sum of $250.00.

That the Clerk of this Court transmit to the Supreme Court of the United States, in the manner provided by law, a transcript of such parts of the record and proceedings herein, duly authenticated, as the parties defendants and plaintiffs may by praecipe duly designate.

[fol. 68] That a citation be issued admonishing the plaintiffs to be and appear in the Supreme Court of the United States on or before the 9th day of December, 1942.

Whereupon came W. W. Trent, one of the defendants, and tendered a bond for costs on appeal, executed by him, as Principal, and by Continental Casualty Company, a corporation, as surety, in the amount of $250.00, conditioned as provided by law, which bond having been inspected by the Court, is approved and ordered filed.

John J. Parker, Judge of the United States Circuit Court for the Fourth Circuit. Harry E. Watkins, Judge of the District Court of the United States for the Northern and Southern Districts of West Virginia. Ben Moore, Judge of the District Court of the United States for the Southern District of West Virginia.

[fol. 69] IN UNITED STATES DISTRICT COURT

[Title omitted]

PETITION FOR APPEAL—Filed October 31, 1942

To the Honorable John J. Parker, Judge of the United States Circuit Court for the Fourth Circuit; the Honorable Harry E. Watkins, Judge of the District Court of the United States for the Northern and Southern Districts of West Virginia, and the Honorable Ben Moore, Judge of the District Court of the United States for the Southern District of West Virginia, Composing a Statutory Court under the Provisions of Section 380, Amended, Title 28 of the United States Code, Annotated:

Now come The West Virginia State Board of Education, composed of W. W. Trent, President, Mary H. Davisson, Thelma B. Loudin, Raymond Brewster, Lydia C. Hern, L. V. Thompson, and Mrs. Douglas W. Brown, and considering themselves aggrieved by the decree entered on the 6th day of October, 1942, in the above entitled cause, [fol. 70] awarding a permanent injunction restraining and enjoining the defendants from requiring the children of the plaintiffs, or any other children having religious scruples against such action, to salute the flag of the United States or any other flag, or from expelling such children from school for failure to salute it, as prayed for in the plaintiffs' complaint, does hereby appeal therefrom to the Supreme Court of the United States, for reasons specified in the assignment of errors, which is filed herewith, and prays:

1. That this appeal be allowed;

2. That a citation be issued to the above named plaintiffs, Walter Barnette, Paul Stull, and Lucy McClure, as provided by law;

3. That a transcript of the record, proceedings and papers upon which said decree was predicated, duly authenticated, be sent to the Supreme Court of the United States, together with the typewritten statement of defendants disclosing the basis upon which it is contended that the Supreme Court of the United States has jurisdiction to review the decree, which statement is filed herewith.

4. That the Court decree that the bond, in the sum of $250.00, conditioned according to law, and filed herewith, is in a sufficient amount, and that if the Court be of opinion that the amount is not sufficient, that it fix the amount of the bond.

The West Virginia State Board of Education, Composed of W. W. Trent, President; Mary H. Davisson, Thelma B. Loudin, Raymond Brewster, Lydia C. Hern, L. V. Thompson, and Mrs. Douglas W. Brown, by Ira J. Partlow, Assistant Attorney General of West Virginia, Counsel for Defendants.

[fol. 71] The undersigned counsel of record for the plaintiffs hereby acknowledge service of a copy of the foregoing petition for appeal.

Dated at Charleston, West Virginia, this 29th day of October, 1942.

Hayden C. Covington, per H. S. Meldahl, Horace S. Meldahl, Counsel for Plaintiffs.

Appeal allowed upon defendants giving bond conditioned as required by law, in the sum of $250.00, the same to secure the payment of costs.

John J. Parker, Judge of the United States Circuit Court for the Fourth Circuit. Harry E. Watkins, Judge of the District Court of the United States for the Northern and Southern Districts of West Virginia. Ben Moore, Judge of the District Court of the United States for the Southern District of West Virginia.

[fol. 72] In United States District Court

[Title omitted]

Assignment of Errors—Filed October 31, 1942

Come now The West Virginia State Board of Education, composed of W. W. Trent, President Mary H. Davisson, Thelma B. Loudin, Raymond Brewster, Lydia C. Hern, L. V. Thompson, and Mrs. Douglas W. Brown, defendants in the above styled cause, by their counsel, and say that there are manifest errors in the record, proceedings and final decree in said cause, upon which they will rely upon

their appeal from the decree entered on the 6th day of October, 1942, and for the purpose of having the cause reviewed in the Supreme Court of the United States make the following assignment of errors, to-wit:

1. The Court erred in overruling defendants' motion to dismiss plaintiffs' complaint for want of jurisdiction.

[fol. 73] 2. The Court erred in holding, as a conclusion of law, that the regulation of The West Virginia State Board of Education, in so far as it requires a flag salute from school children who have conscientious scruples based on grounds of religion against giving such salute, is violative of the rights of religious liberty guaranteed by the 14th Amendment against infringement by the states.

3. The Court erred in holding, as a conclusion of law, that plaintiffs are entitled to an injunction restraining the State Board of Education, its agents and employees, and all teachers in the schools of the state from requiring plaintiffs' children or the children of other persons for whom the suit is brought, having religious scruples against giving the flag salute, to give such salute or from expelling them from school for failure to give same.

4. The Court erred in awarding the permanent injunction prayed for in the plaintiffs' bill.

5. The decision of the Court is counter to a decision of the Supreme Court of the United States handed down on June 3, 1940, in the case of *Minersville School District, Board of Education of Minersville School District, et al., Petitioners, v. Walter Gobitis, Individually, and Lillian Gobitis and William Gobitis, Minors, by Walter Gobitis, Their Next Friend*, reported in 310 U. S. 586, 84 Law. ed. 1375, which said decision has in no manner been overruled or modified.

Wherefore, the defendants, The West Virginia State Board of Education, composed of W. W. Trent, President, Mary H. Davisson, Thelma B. Loudin, Raymond Brewster, Lydia C. Hern, L. V. Thompson, and Mrs. Douglas W. Brown, pray that the decree of the District Court of the United States for the Southern District of West Virginia be reversed, and that the injunction granted by said Court

be dissolved, and that a judgment be entered in accordance with the rights of defendants.

Ira J. Partlow, Assistant Attorney General of West Virginia, Counsel for Defendants.

[fol. 74] The undersigned, counsel of record for the plaintiffs, hereby acknowledge service of a copy of the foregoing assignment of errors.

Dated at Charleston, West Virginia, this 29th day of October, 1942.

Horace S. Meldahl, Counsel for Plaintiffs.

[fols. 75-76] Cost Bond on appeal for $250.00 approved and filed October 31, 1942 omitted in printing.

[fols. 77-84] Citation in usual form showing service on Horace S. Meldahl omitted in printing.

[fol. 85] In United States District Court

[Title omitted]

Stipulation as to Record—Filed November 17, 1942

It is hereby stipulated and agreed by and between the parties hereto that for the purpose of appeal, which has been allowed herein, to the Supreme Court of the United States, the Clerk of the District Court of the United States for the Southern District of West Virginia be and he is hereby requested to prepare and forward to the Clerk of the Supreme Court of the United States the transcript of the record on appeal which shall include the following portions of the record:

1. The first amended complaint of the plaintiffs with its exhibits.
2. Defendants' motion to dismiss plaintiffs' complaint.
3. The Court's findings of facts and conclusions of law.
4. The opinion of the Court.

[fol. 86] 5. The final decree of the Court entered October 6, 1942.

6. Petition for allowance of appeal with acknowledgment of service thereof.

7. Assignment of errors accompanying petition for allowance of appeal, and prayer for reversal contained therein and acknowledgment of service thereof.

8. Jurisdictional statement.

9. Order allowing appeal to the Supreme Court of the United States.

10. Bond for costs on appeal to the Supreme Court of the United States.

11. Citation and acknowledgment of service thereof.

12. This stipulation.

It is requested that this transcript be prepared as required by law, the rules of this Court and the rules of the Supreme Court of the United States and that the same be filed in the office of the Clerk of the United States Supreme Court within the time prescribed by this Court in its order of this Court enlarging and extending time.

It is further hereby stipulated and agreed by and between the parties hereto that this stipulation shall be in lieu of a praecipe indicating the portions of the record to be incorporated into the transcript of the record *or* appeal.

Dated this 17th day of November, 1942.

W. S. Wysong, Attorney General of West Virginia; Samuel Biern, Assistant Attorney General of West Virginia, Counsel for Appellants. Horace S. Meldahl, Counsel for Appellees.

[fol. 87] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 88] IN THE SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1942

[Title omitted]

APPELLANTS' STATEMENT OF POINTS AND DESIGNATION OF PORTIONS OF RECORD ON APPEAL—Filed December 16, 1942

I

Come now the appellants in the above entitled cause, and for their statement of the points on which they intend to rely in their appeal to this Court adopt the points contained in the assignment of errors heretofore filed herein.

II

Appellants herein designate defendants' cost bond on appeal and jurisdictional statement as being unnecessary for the consideration of the points herein relied upon. Appellants designate all other portions of the record as being necessary for such consideration.

(S.) W. S. Wysong, Attorney General; (S.) Samuel Biern, Assistant Attorney General, Counsel for Appellants.

Service of foregoing statement on behalf of each of the appellees is acknowledged this 27th day of November, 1942.

(S.) Hayden C. Covington, Counsel for Appellees.

[fol. 89] In the Supreme Court of the United States

Designation of Parts of the Record To Be Printed—Filed December 16, 1942

To the Clerk of the United States Supreme Court:

You will please print all of the documents contained in the above captioned cause now on file with your office pursuant to dispatch thereof to you by the Clerk of the District Court of the United States for the Southern District of West Virginia, to wit:

1. The amended complaint.
2. The exhibit annexed to the amended complaint, namely, the booklet entitled "God and the State", in entirety.
3. Defendants' motion to dismiss.
4. Judgment of the court granting injunction.
5. Opinion and findings of fact.
6. Petition for allowance of appeal.
7. Assignments of error.
8. Order allowing appeal.
9. Citation.

Omitting to print cost bond and jurisdictional statement.

Dated, November 17, 1942.

Hayden C. Covington, Attorney for Appellees.

[fol. 90] SUPREME COURT OF THE UNITED STATES

[Title omitted]

ORDER NOTING PROBABLE JURISDICTION—January 4, 1943

The statement of jurisdiction in this case having been submitted and considered by the Court, probable jurisdiction is noted.

Endorsed on Cover: File No. 47,092. S. West Virginia, D. C. U. S. Term No. 591. The West Virginia State Board of Education, etc., et al., Appellants, vs. Walter Barnette, Paul Stull and Lucy McClure. Filed December 16, 1942. Term No. 591, O. T. 1942.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1942

No. 591

THE WEST VIRGINIA STATE BOARD OF EDUCATION, ETC., ET AL.,

Appellants,

vs.

WALTER BARNETTE, PAUL STULL AND LUCY McCLURE.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA.

STATEMENT AS TO JURISDICTION.

IRA J. PARTLOW,
Assistant Attorney General
of West Virginia,
Counsel for Appellants.

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IN THE DISTRICT COURT OF THE UNITED STATES, FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA

No. 242

WALTER BARNETTE, PAUL STULL, AND LUCY, McCLURE,

Plaintiffs.

vs.

THE WEST VIRGINIA STATE BOARD OF EDUCATION, COMPOSED OF HONORABLE W. W. TRENT, PRESIDENT; MARY H. DAVISSON, THELMA B. LOUDIN, RAYMOND BREWSTER, LYDIA C. HERN, L. V. THOMPSON, AND MRS. DOUGLAS W. BROWN, AND ALL OTHER BOARDS, OFFICIALS, TEACHERS AND PERSONS SUBJECT TO THE JURISDICTION AND CONTROL OF SAID STATE BOARD OF EDUCATION,

Defendants.

BEFORE PARKER, CIRCUIT JUDGE, AND WATKINS AND MOORE, DISTRICT JUDGES.

JURISDICTIONAL STATEMENT.

(Filed October 31, 1942.)

In compliance with Rule 12 (1) of the Supreme Court of the United States, appellants file their statement disclosing the basis upon which it is contended that the Su-

preme Court of the United States has jurisdiction upon appeal to review the decree in question.

Statutory Provision Believed to Sustain the Jurisdiction.

Jurisdiction of the Supreme Court of the United States is invoked under Section 380, Title 28, United States Code, Annotated, and particularly the following provision thereof:

> "* * * and a direct appeal to the Supreme Court may be taken from a final decree granting or denying a permanent injunction in such suit."

The Statutes of West Virginia and Order of Administrative Board of West Virginia, the Validity of Which is Involved.

Section 5, Article 2, Chapter 18 of the Code of West Virginia, is as follows:

> "General Powers and Duties.—Subject to and in conformity with the Constitution and laws of this State, the state board of education shall determine the educational policies of the State, except as to the West Virginia University, and shall make rules for carrying into effect the laws and policies of the State relating to education, including rules relating to the physical welfare of pupils, the education of feeble-minded and physically disabled or crippled children of school age, retirement fund for teachers, school attendance, evening and continuation or part-time day schools, school extension work, the classification of schools, the issuing of certificates upon credentials, the purchase, distribution and care of free textbooks by the district boards of education, the general powers and duties of county and district boards of education, and of school trustees, teachers, principals, supervisors, and superintendents, and such other matters pertaining to the public schools in the State as may seem to the Board to be necessary and expedient."

In pursuance of the State statute, the West Virginia State Board of Education, an administrative board of the State of West Virginia, on January 9, 1942, adopted the following order or regulation:

"WHEREAS, The West Virginia State Board of Education holds in highest regard those rights and privileges guaranteed by the Bill of Rights in the constitution of the United States of America and in the Constitution of West Virginia, specifically, the first amendment to the Constitution of the United States as restated in the fourteenth amendment to the same document and in the guarantee of religious freedom in Article III of the Constitution of this State, and

"WHEREAS, The West Virginia State Board of Education honors the broad principle that one's convictions about the ultimate mystery of the universe and man's relation to it is placed beyond the reach of law; that the propagation of belief is protected whether in church or chapel, mosque or synagogue, tabernacle or meeting house; that the Constitution of the United States and of the State of West Virginia assure generous immunity to the individual from imposition of penalty for offending, in the course of his own religious activities, the religious views of others, be they a minority or those who are dominant in the government, but

"WHEREAS, The West Virginia State Board of Education recognizes that the manifold character of man's relations may bring his conception of religious duty into conflict with the secular interests of his fellowman; that conscientious scruples have not in the course of the long struggle for religious toleration relieved the individual from obedience to the general law not aimed at the promotion or restriction of the religious beliefs; that the mere possession of convictions which contradict the relevant concerns of political society does not relieve the citizen from the discharge of political responsibility, and

"WHEREAS, The West Virginia State Board of Education holds that national unity is the basis of national

security; that the flag of our Nation is the symbol of our National Unity transcending all internal differences, however large within the framework of the Constitution; that the Flag is the symbol of the Nation's power; the emblem of freedom in its truest, best sense; that it signifies government resting on the consent of the governed, liberty regulated by law, protection of the weak against the strong, security against the exercise of arbitrary power, and absolute safety for free institutions against foreign aggression, and

"Whereas, The West Virginia State Board of Education maintains that the public schools, established by the legislature of the State of West Virginia under the authority of the Constitution of the State of West Virginia and supported by taxes imposed by legally constituted measures, are dealing with the formative period in the development in citizenship that the Flag is an allowable portion of the program of schools thus publicly supported.

"Therefore, be it Resolved, That the West Virginia Board of Education does hereby recognize and order that the commonly accepted salute to the Flag of the United States—the right hand is placed upon the breast and the following pledge repeated in unison: 'I pledge allegiance to the Flag of the United States of America and to the Republic for which it stands; one Nation, indivisible, with liberty and justice for all'—now become a regular part of the program of activities in the public schools, supported in whole or in part by public funds, and that all teachers as defined by law in West Virginia and pupils in such schools shall be required to participate in the salute honoring the Nation represented by the Flag; provided, however, that refusal to salute the Flag be regarded as an act of insubordination, and shall be dealt with accordingly."

Section 5A, Article 8, Chapter 18 of the Code of West Virginia, as last amended, relates to compulsory school attendance, and is as follows:

"If a child be dismissed, suspended or expelled from school because of refusal of such child to meet the legal

and lawful requirements of the school and the established regulations of the county and or state board of education, further admission of the child to school shall be refused until such requirements and regulations be complied with. Any such child shall be treated as being unlawfully absent from the school during the time he refuses to comply with such requirements and regulations, and any person having legal or actual control of such child shall be liable to prosecution under the provisions of this article for the absence of such child from school."

Section 9, Article 2, Chapter 18 of the Code of West Virginia, as amended by Chapter 38 of the Acts of the Legislature of 1941, is in part as follows:

"In all public, private, parochial and denominational schools located within this state there shall be given regular courses of instruction in history of the United States, in civics, and in the constitutions of the United States and of the State of West Virginia, for the purpose of teaching, fostering and perpetuating the ideals, principles and spirit of Americanism, and increasing the knowledge of the organization and machinery of the government of the United States and of the state of West Virginia. The state board of education shall, with the advice of the state superintendent of schools, prescribe the courses of study covering these subjects for the public elementary and grammar schools, public high schools and state normal schools. It shall be the duty of the officials or boards having authority over the respective private, parochial and denominational schools to prescribe courses of study for the schools under their control and supervision similar to those required for the public schools."

Date of Decree Sought to be Reversed.

The decree was entered on the 6th day of October, 1942. The application for appeal is presented on the 31st day of October, 1942.

The appellants append hereto a copy of the opinion of the District Court delivered in this cause, together with the Court's Findings of Fact and Conclusions of Law.

Respectfully submitted,

IRA J. PARTLOW,
Assistant Attorney General of
West Virginia,
Counsel for Appellants.

APPENDIX "A".

Opinion

DISTRICT COURT OF THE UNITED STATES,
SOUTHERN DISTRICT OF WEST VIRGINIA.

WALTER BARNETTE, PAUL STULL, and LUCY MCCLURE, *Plaintiffs*,

versus

THE WEST VIRGINIA STATE BOARD OF EDUCATION, composed of Hon. W. W. Trent, President, Mary H. Davisson, Thelma B. Loudin, Raymond Brewster, Lydia C. Hern, L. V. Thompson, and Mrs. Douglas W. Brown, and all other boards, officials, teachers and persons subject to the jurisdiction and control of said State Board of Education, *Defendants*.

On Motion for Interlocutory Injunction and Submission for Final Decree.

(Argued September 15, 1942. Decided October 6, 1942).

Before Parker, Circuit Judge, and Harry E. Watkins and Moore, District Judges:

Hayden C. Covington and Horace S. Meldahl, for Plaintiffs; and William S. Wysong, Attorney General of West Virginia, and Ira J. Partlow, Assistant Attorney General of West Virginia, for Defendants.

PARKER, Circuit Judge:

This is a suit by three persons belonging to the sect known as "Jehovah's Witnesses", who have children attending the public schools of West Virginia, against the Board of Education of that state. It is brought by plaintiffs in behalf of themselves and their children and all other persons in the State of West Virginia in like situation, and its purpose is to secure an injunction restraining the State

Board of Education from enforcing against them a regulation of the Board requiring children in the public schools to salute the American flag. They allege that they and their children and other persons belonging to the sect of "Jehovah's Witnesses" believe that a flag salute of the kind required by the Board is a violation of the second commandment of the Decalogue, as contained in the 20th chapter of the book of Exodus; that because of this belief they cannot comply with the regulation of the Board; that, if they fail to comply, the children will be expelled from school, and thus be deprived of the benefits of the state's public school system; and that plaintiffs, in such event, will have to provide them education in private schools at great expense or be subjected to prosecution for crime for failing to send them to school, as required by the compulsory school attendance law of the state. They contend, therefore, that the regulation amounts to a denial of religious liberty and is violative of rights which the first amendment to the federal Constitution protects against impairment by the Federal government and which the 14th Amendment protects against impairment by the states.

A motion has been made to dismiss the bill on the ground that the regulation of the Board is a proper exercise of power vested in it by the State of West Virginia, and that, under the doctrine of Minersville District *v.* Gobitis 310 U. S. 586, the flag salute which it requires cannot be held a violation of the religious rights of plaintiffs. The case was heard on application for interlocutory injunction; but the parties have agreed that it be submitted for final decree on the bill and motion to dismiss. No question is raised as to jurisdiction; and it appears from the face of the bill that the case is one arising under the Constitution of the United States involving, as to each plaintiff, a sum in excess of $3,000.00, since it is alleged that each of plaintiffs would be required to incur expense in excess of that amount if their children should be excluded from the public schools. And it seems clear that there is jurisdiction, irrespective of the amount involved, since the suit is for the protection of rights and privileges guaranteed by the due process clause of the 14th Amendment, and jurisdiction is given by Judicial Code Sec. 24(14). Hague *v.* C. I. O. 307 U. S. 496,

525. There is, therefore, but one question for our decision, viz.: whether children who for religious reasons have conscientious scruples against saluting the flag of the country, can lawfully be required to salute it. We think that this question must be answered in the negative.

Ordinarily we would feel constrained to follow an unreversed decision of the Supreme Court of the United States, whether we agree with it or not. It is true that decisions are but evidences of the law and not the law itself; but the decisions of the Supreme Court must be accepted by the lower courts as binding upon them if any orderly administration of justice is to be attained. The developments with respect to the Gobitis case, however, are such that we do not feel that it is incumbent upon us to accept it as binding authority. Of the seven justices now members of the Supreme Court who participated in that decision, four have given public expression to the view that it is unsound, the present Chief Justice in his dissenting opinion rendered therein and three other justices in a special dissenting opinion in Jones *v.* City of Opelika — U. S. —, 62 S. Ct. 1231, 1251. The majority of the court in Jones *v.* City of Opelika, moreover, thought it worth while to distinguish the decision in the Gobitis case, instead of relying upon it as supporting authority. Under such circumstances and believing, as we do, that the flag salute here required is violative of religious liberty when required of persons holding the religious views of plaintiffs, we feel that we would be recreant to our duty as judges, if through a blind following of a decision which the Supreme Court itself has thus impaired as an authority, we should deny protection to rights which we regard as among the most sacred of those protected by constitutional guaranties.

There is, of course, nothing improper in requiring a flag salute in the schools. On the contrary, we regard it as a highly desirable ceremony calculated to inspire in the pupils a proper love of country and reverence for its institutions. And, from our point of view, we see nothing in the salute which could reasonably be held a violation of any of the commandments in the Bible or of any of the duties owing

by man to his Maker. But this is not the question before us. Admittedly plaintiffs and their children do have conscientious scruples, whether reasonable or not, against saluting the flag, and these scruples are based on religious grounds. If they are required to salute the flag, or are denied rights or privileges which belong to them as citizens because they fail to salute it, they are unquestionably denied that religious freedom which the Constitution guarantees. The right of religious freedom embraces not only the right to worship God according to the dictates of one's conscience, but also the right "to do, or forbear to do, any act, for conscience sake, the doing or forbearing of which is not prejudicial to the public weal". Chief Justice Gibson in Commonwealth *v.* Lesher, 17 Serg. & R. (Pa.) 155.

Courts may decide whether the public welfare is jeopardized by acts done or omitted because of religious belief; but they have nothing to do with determining the reasonableness of the belief. That is necessarily a matter of individual conscience. There is hardly a group of religious people to be found in the world who do not hold to beliefs and regard practices as important which seem utterly foolish and lacking in reason to others equally wise and religious; and for the courts to attempt to distinguish between religious beliefs or practices on the ground that they are reasonable or unreasonable would be for them to embark upon a hopeless undertaking and one which would inevitably result in the end of religious liberty. There is not a religious persecution in history that was not justified in the eyes of those engaging in it on the ground that it was reasonable and right and that the persons whose practices were suppressed were guilty of stubborn folly hurtful to the general welfare. The fathers of this country were familiar with persecution of this character; and one of their chief purposes in leaving friends and kindred and settling here was to establish a nation in which every man might worship God in accordance with the dictates of his own conscience and without interference from those who might not agree with him. The religious freedom guaranteed by the 1st and 14th Amendments means that he shall have the right to do this, whether his belief is reasonable

or not, without interference from anyone, so long as his action or refusal to act is not directly harmful to the society of which he forms a part.

This does not mean, of course, that what a man may do or refrain from doing in the name of religious liberty is without limitations. He must render to Caesar the things that are Caesar's as well as to God the things that are God's. He may not refuse to bear arms or pay taxes because of religious scruples, nor may he engage in polygamy or any other practice directly hurtful to the safety, morals, health or general welfare of the community. See cases cited in Minersville School District *v.* Gobitis, 3 Cir. 108 F. 2d 683, 689. To justify the overriding of religious scruples, however, there must be a clear justification therefor in the necessities of national or community life. Like the right of free speech, it is not to be overborne by the police power, unless its exercise presents a clear and present danger to the community. Cf. Herndon *v.* Lowry, 301 U. S. 242, where it was said: "The power of a state to abridge freedom of speech and of assembly is the exception rather than the rule and the penalizing even of utterances of a defined character must find its justification in a reasonable apprehension of danger to organized government. The judgment of the legislature is not unfettered. The limitation upon individual liberty must have appropriate relation to the safety of the state." Religious freedom is no less sacred or important to the future of the Republic than freedom of speech; and if speech tending to the overthrow of the government but not constituting a clear and present danger may not be forbidden because of the guaranty of free speech, it is difficult to see how it can be held that conscientious scruples against giving a flag salute must give way to an educational policy having only indirect relation, at most, to the public safety. Surely, it cannot be that the nation is endangered more by the refusal of school children, for religious reasons, to salute the flag than by the advocacy on the part of grown men of doctrines which tend towards the overthrow of the government.

The suggestion that the courts are precluded by the action of state legislative authorities in deciding when rights

of religious freedom must yield to the exercise of the police power would, of course, nullify the constitutional guaranty. It would not be worth the paper it is written on, if no legislature or school board were bound to respect it except in so far as it might accord with the policy they might choose to follow. For the courts to so hold would be for them to abdicate the most important duty which rests on them under the Constitution. The tyranny of majorities over the rights of individuals or helpless minorities has always been recognized as one of the great dangers of popular government. The fathers sought to guard against this danger by writing into the Constitution a bill of rights guaranteeing to every individual certain fundamental liberties, of which he might not be deprived by any exercise whatever of governmental power. This bill of rights is not a mere guide for the exercise of legislative discretion. It is a part of the fundamental law of the land, and is to be enforced as such by the courts. If legislation or regulations of boards conflict with it, they must give way; for the fundamental law is of superior obligation. It is true of freedom of religion, as was said of freedom of speech in Schneider *v.* State 308 U. S. 147, 161:

> "In every case, therefore, where legislative abridgment of the rights is asserted, the courts should be astute to examine the effect of the challenged legislation. Mere legislative preferences or beliefs respecting matters of public convenience may well support regulation directed at other personal activities, but be insufficient to justify such as diminishes the exercise of rights so vital to the maintenance of democratic institutions. And so, as cases arise, the delicate and difficult task falls upon the courts to weigh the circumstances and to appraise the substantiality of the reasons advanced in support of the regulation of the free enjoyment of the rights."

Can it be said by the Court, then, in the exercise of the duty to examine the regulation here in question, that the requirement that school children salute the flag has such

direct relation to the safety of the state, that the conscientious objections of plaintiffs must give way to it? Or to phrase the matter differently, must the religious freedom of plaintiffs give way because there is a clear and present danger to the state if these school children do not salute the flag, as they are required to do? It seems to us that to ask these questions is to answer them, and to answer them in the negative. As fine a ceremony as the flag salute is, it can have at most only an indirect influence on the national safety; and no clear and present danger will result to anyone if the children of this sect are allowed to refrain from saluting because of their conscientious scruples, however groundless we may personally think these scruples to be. It certainly cannot strengthen the Republic, or help the state in any way, to require persons to give a salute which they have conscientious scruples against giving, or to deprive them of an education because they refuse to give it. As was well said by Chief Justice Lehman of New York in his concurring opinion in People *v.* Sandstrom, 279 N. Y. 523, 18 N. E. 2d 840: "The salute of the flag is a gesture of love and respect—fine when there is real love and respect back of the gesture. The flag is dishonored by a salute by a child in reluctant and terrified obedience to a command of secular authority which clashes with the dictates of conscience."

The salute to the flag is an expression of the homage of the soul. To force it upon one who has conscientious scruples against giving it, is petty tyranny unworthy of the spirit of this Republic and forbidden, we think, by the fundamental law. This court will not countenance such tyranny but will use the power at its command to see that rights guaranteed by the fundamental law are respected. We are not impressed by the argument that the powers of the School Board are limited by reason of the passage of the joint resolution of June 22, 1942, pertaining to the use and display of the flag; but we are clearly of opinion that the regulation of the Board requiring that school children salute the flag is void in so far as it applies to children having conscientious scruples against giving such salute

and that, as to them, its enforcement should be enjoined. Injunctive order will issue accordingly.

Injunction Granted.

I concur: Harry E. Watkins, U. S. District Judge for the Northern and Southern Districts of West Virginia.

I concur: Ben Moore, U. S. District Judge for the Southern District of West Virginia.

APPENDIX "B".

DISTRICT COURT OF THE UNITED STATES,
SOUTHERN DISTRICT OF WEST VIRGINIA.

No. 242.

WALTER BARNETTE, PAUL STULL, and LUCY MCCLURE,
Plaintiffs,

versus

THE WEST VIRGINIA STATE BOARD OF EDUCATION, Composed of Hon. W. W. Trent, President, Mary H. Davisson, Thelma B. Loudin, Raymond Brewster, Lydia C. Hern, L. V. Thompson, and Mrs. Douglas W. Brown, and All Other Boards, Officials, Teachers and Persons Subject to the Jurisdiction and Control of said State Board of Education, *Defendants*.

Findings of Fact and Conclusions of Law.

In the above entitled cause the special court of three judges makes the following findings of fact and conclusions of law.

Findings of Fact.

1. That this is a suit to protect rights and privileges guaranteed by the 14th Amendment to the Constitution of the United States and the matter in controversy exceeds the sum or value of $3,000.00.

2. That plaintiffs are citizens of West Virginia and have children who attend the public schools of that state.

3. That plaintiffs and their children are members of a sect known as "Jehovah's Witnesses" and, as such, have

conscientious scruples based on religious grounds against saluting the flag of the United States or any other national flag.

4. That the defendant the West Virginia State Board of Education has adopted a regulation requiring children in the public schools of the state to salute the flag of the United States and providing for their expulsion from school upon failure to give such salute.

5. That because of their conscientious scruples based on religious belief, plaintiffs and their children will not comply with the regulation of the Board of Education requiring the flag salute, and that the Board of Education unless restrained will expel plaintiffs' children from school for failure to comply therewith.

6. That, upon the expulsion of plaintiffs' children from school, they will be deprived of the benefit of education in the public schools to which they are entitled under the laws of West Virginia, and plaintiffs will have to pay to have them educated in private schools or be subject to prosecution under the compulsory education law of West Virginia for failure to send them to schools.

7. That this suit is brought by plaintiffs in behalf of themselves and all other persons similarly situated with respect to the enforcement of the regulation of the Board of Education.

Conclusions of Law.

1. That the regulation of the Board of Education, in so far as it requires a flag salute from school children who have conscientious scruples based on grounds of religion against giving such salute, is violative of the rights of religious liberty guaranteed by the 14th Amendment against infringement by the states.

2. That plaintiffs are entitled to an injunction restraining the State Board of Education, its agents and employees, and all teachers in the schools of the state from requiring plaintiffs' children or the children of other persons for

whom the suit is brought, having religious scruples against giving the flag salute, to give such salute or from expelling them from school for failure to give same.

Enter: Oct. 6, 1942.

JOHN J. PARKER,
U. S. Circuit Judge, Fourth Circuit.
HARRY E. WATKINS,
U. S. District Judge for the Northern and Southern Districts of West Virginia.
BEN MOORE,
U. S. District Judge, Southern District of West Virginia.

(3711)

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1942

No. 591

THE WEST VIRGINIA STATE BOARD OF EDUCATION, etc., et al.,

Appellants,

vs.

WALTER BARNETTE, PAUL STULL and LUCY McCLURE,

Appellees.

BRIEF FOR APPELLANTS

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IN THE

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OCTOBER TERM, 1942

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THE WEST VIRGINIA STATE BOARD OF EDUCATION, etc., et al.,

Appellants,

vs.

WALTER BARNETTE, PAUL STULL and LUCY McCLURE,

Appellees.

BRIEF FOR APPELLANTS

OPINIONS BELOW

The opinions of the court below are reported in 47 Fed. Supp. (Adv.), page 251.

JURISDICTION

A statement as to jurisdiction has been filed and separately printed, pursuant to Rule 12, Paragraph 1 of this Court. Jurisdiction is invoked under Section 380, Title

28, U. S. C. A. Probable jurisdiction was noted January 4, 1943 (R. 62).

STATEMENT OF THE CASE

This is an appeal from the judgment of the United States District Court for the Southern District of West Virginia rendered by a three-judge court convened under the provisions of Section 266, amended, of the Judicial Code (28 U. S. C. A. 380). The suit involves the constitutionality of a regulation or order promulgated by the West Virginia State Board of Education under the provisions of Section 5, Article 2, Chapter 18 of the Code of West Virginia, 1931 (Appendix A), and subject to the provisions of Section 5-a, Article 8, Chapter 18 of the Code of West Virginia, as last amended (Appendix A-1), and Section 9, Article 2, Chapter 18 of the Code of West Virginia, as amended by Chapter 38, Acts of the Legislature, 1941 (Appendix A-2). The regulation of the Board (Appendix B) requires children and teachers in the public schools to salute the American flag and provides that such salute become a regular part of the program of activities in the public schools, with the further provision that refusal to salute the flag be regarded as an act of insubordination to "be dealt with accordingly." Section 5-a, Article 8, Chapter 18 of the Code of West Virginia, as amended (Appendix A-1), provides, among other things, that failure of a child to comply with the established regulations of the State Board of Education shall result in refusal of further admission of the child to school until such regulations are complied with.

Suit was instituted August 19, 1942, in the District Court of the United States for the Southern District of West Virginia by three persons belonging to the sect known as "Jehovah's Witnesses," the parents of chil-

dren attending the public schools of West Virginia, against the Board of Education of the State of West Virginia; claiming Federal jurisdiction because the regulation or order of the Board was a denial of religious liberty and was violative of rights which the First Amendment to the Federal Constitution protected against impairment by the Federal Government, and which the Fourteenth Amendment thereof protected against impairment by the states (R. 16); and further claiming jurisdiction in equity because of the absence of an adequate remedy at law (R. 15). The suit was brought by plaintiffs (appellees) in behalf of themselves, their children and all other persons in the State of West Virginia in like situation. The purpose of the suit was to secure an injunction restraining the West Virginia Board of Education (appellants) from enforcing against them an order or regulation requiring children in the public schools to salute the American flag (R. 1-16). The case was heard on application of appellees for an interlocutory injunction, but the parties to the suit agreed that it be submitted for a final decree on the bill of complaint and the motion of appellants to dismiss the bill.

Appellants moved to dismiss the bill on the grounds that the regulation of the Board was a proper exercise of power vested in it by the Legislature of the State of West Virginia; that under the doctrine of the case of *Minersville School District* v. *Gobitis*, 310 U. S. 586, the salute of the flag required by it could not be held to be a violation of religious rights of plaintiffs; and that the bill presented no substantial Federal question arising under the Constitution of the United States and involved no substantial Federal question because of the decision of this Court in the case of *Minersville School District* v. *Gobitis*, which decision had not been modified or overruled, and because there was no act of the Congress of the United

States which undertook or purported to legislate with respect to the nature of the allegations contained in the complaint (R. 43-45).

It was and is the contention of appellees that to salute the flag, as required by the regulation of the Board, would do violence to the commands of Almighty God, according to Chapter 20 of the Book of Exodus (R. 3).

Disposition of Case by Trial Court

The court below determined that the regulation of the Board of Education, insofar as it required a salute to the flag from school children who have conscientious religious scruples against giving such salute, is violative of the rights of religious liberty guaranteed by the Fourteenth Amendment against infringement by the state; that plaintiffs were entitled to an injunction restraining the Board of Education, its agents and employees and all teachers in the schools of the state from requiring plaintiffs' children, or the children of other persons for whom the suit was brought and having religious scruples against giving the flag salute, to give such salute or from expelling them from school for failure to give the salute (R. 47-48).

Findings of Fact

Inasmuch as the case was submitted for decision upon the allegations of the bill of complaint and the averments of the motion to dismiss the same, the District Court summarized certain facts appearing therefrom. The court

> 1. That this is a suit to protect rights and privileges guaranteed by the 14th Amendment to the Constitution of the United States and the matter in controversy exceeds the sum of value of $3,000.00.

2. That plaintiffs are citizens of West Virginia and have children who attend the public schools of that state.

3. That plaintiffs and their children are members of a sect known as "Jehovah's Witnesses" and, as such, have conscientious scruples based on religious grounds against saluting the flag of the United States or any other national flag.

4. That the defendant, the West Virginia State Board of Education, has adopted a regulation requiring children in the public schools of the state to salute the flag of the United States and providing for their expulsion from school upon failure to give such salute.

5. That because of their conscientious scruples based on religious belief, plaintiffs and their children will not comply with the regulation of the Board of Education requiring the flag salute, and that the Board of Education unless restrained will expel plaintiffs' children from school for failure to comply therewith.

6. That, upon the expulsion of plaintiffs' children from school, they will be deprived of the benefit of education in the public schools to which they are entitled under the laws of West Virginia, and plaintiffs will have to pay to have them educated in private schools or be subject to prosecution under the compulsory education law of West Virginia for failure to send them to schools.

7. That this suit is brought by plaintiffs in behalf of themselves and all other persons similarly situated with respect to the enforcement of the regulation of the Board of Education.

Final Judgment

The court below in its final decree of October 6, 1942, awarded a permanent injunction restraining and inhibit-

ing appellants from requiring the children of appellees, or any other children having religious scruples against such action, to salute the flag of the United States or any other flag, or from expelling such children from the public schools of the state for failure to salute it, as prayed for in plaintiffs' bill of complaint (R. 45-46).

SPECIFICATION OF ERRORS RELIED UPON

Appellants will rely upon the assignment of errors filed with the petition for appeal (R. 57) as constituting also the points stated to be relied upon (R. 60):

1. The Court erred in overruling defendants' motion to dismiss plaintiffs' complaint for want of jurisdiction.

2. The Court erred in holding, as a conclusion of law, that the regulation of the West Virginia State Board of Education, in so far as it requires a flag salute from school children who have conscientious scruples based on grounds of religion against giving such salute, is violative of the rights of religious liberty guaranteed by the 14th Amendment against infringement by the states.

3. The Court erred in holding, as a conclusion of law, that plaintiffs are entitled to an injunction restraining the State Board of Education, its agents and employees, and all teachers in the schools of the state from requiring plaintiffs' children or the children of other persons for whom the suit is brought, having religious scruples against giving the flag salute, to give such salute or from expelling them from school for failure to give same.

4. The Court erred in awarding the permanent injunction prayed for in the plaintiffs' bill.

5. The decision of the Court is counter to a decision of the Supreme Court of the United States handed down on June 3, 1940, in the case of *Minersville School District*,

Board of Education of Minersville School District, et al., Petitioners, v. Walter Gobitis, Individually, and Lillian Gobitis and William Gobitis, Minors, by Walter Gobitis, Their Next Friend, reported in 310 U. S. 586, 84 Law. ed. 1375, which said decision has in no manner been overruled or modified.

SUMMARY OF ARGUMENT

I

Appellants' motion to dismiss the bill of complaint should have been sustained.

(a) No substantial Federal question is involved. A Federal question may be plainly unsubstantial either because it is obviously without merit or because its unsoundness so clearly results from previous decisions of the Court as to foreclose the subject and leave no room for the inference that the question sought to be raised can be the subject of controversy.

Utley v. City of St. Petersburg, Florida, 292 U. S. 106;

Ex parte Poresky, 290 U. S. 30;

McGilvra v. Ross, 215 U. S. 70;

Zucht v. King, 260 U. S. 174.

(b) The Federal questions alleged are:

(1) The order or regulation promulgated by the State Board of Education as applied to appellees violates the First Amendment and the "due process" and "equal protection" clauses of the Fourteenth Amendment to the Constitution of the United States.

(c) The contention that the order or regulation of appellants is unconstitutional as applied to appellees has been resolved by this Court adversely to the contention of appellees.

Minersville School District et al. v. Gobitis, 310 U. S. 586.

II

Neither Section 5, Article 2, Chapter 18; Section 5-a, Article 8, Chapter 18; Section 9, Article 2, Chapter 18 of the Code of West Virginia 1931, as amended, nor the regulation or order promulgated thereunder and pursuant thereto by appellants is in conflict with or superseded by any act of the Congress of the United States.

(a) House Joint Resolution 303, Public Law 623, 77th Congress (second session), passed and approved June 22, 1942, is not an act of the Congress of the United States.

ARGUMENT

I

The Motion to Dismiss Because of Want of a Substantial Federal Question Should Have Been Sustained

It is well established by decisions of this Court that the existence of a substantial question of constitutionality must be determined from a consideration of the allegations of the bill of complaint. *Ex parte Poresky*, 290 U. S. 30; *Mosher v. Phoenix*, 287 U. S. 29.

The bill of complaint alleges that the regulation promulgated by appellants requiring a salute to the flag, and the statutes of West Virginia, pursuant to which the regula-

tion was adopted, violate the First and Fourteenth Amendments of the Constitution of the United States. Under decisions of this Court a Federal question must be a substantial one, otherwise the jurisdiction fails. *Louisville & Nashville Railroad Company* v. *Garrett*, 231 U. S. 298. When a question has been foreclosed by prior decision of the Court, such question may no longer be substantial. *Utley* v. *City of St. Petersburg, Florida*, 292 U. S. 106.

> "• • • The question may be plainly unsubstantial, either because it is 'obviously without merit' or because 'its unsoundness so clearly results from the previous decisions of this court as to foreclose the subject and leave no room for the inference that the question sought to be raised can be the subject of controversy.' • • • "
>
> *Ex parte Poresky*, 290 U. S. 30, 32.

In the case of *Utely* v. *St. Petersburg, Florida*, 292 U. S. 106, it is expressly held also that no substantial Federal question forming a basis for review by this Court is presented by a contention of invasion of a constitutional right where such question has been settled by a previous decision of the Court. It is believed that the constitutional questions raised in the bill of complaint have been so foreclosed by the decisions of this Court in the case of *Minersville School District* v. *Gobitis*, 310 U. S. 586, as to cause such questions now to be so frivolous and unsubstantial as not to sustain the Federal jurisdiction alleged. That case has not been modified or reversed and the contentions of appellees herein are but reiterations of the contentions made and overruled by this Court therein. The facts and principles involved and considered by the Court in that case cannot, it would seem, in any wise be distinguished from those present in

the case at bar. They are similar in each and every respect. We are so impressed with the thorough consideration and sound disposition by this Court, in that case, of the principles applicable to the controversy herein that appellants feel that it is imperative that they rest the case at bar upon that decision. That case, as we have said, substantially covers all the points herein involved and this Court therein expressly holds that the requirement of participation, by pupils in public schools, in the ceremony of saluting a national flag does not infringe the due process of law clause of the Constitution of the United States in its guarantee of religious liberties under the Fourteenth Amendment. We quote from the opinion:

> "* * * The religious liberty which the Constitution protects has never excluded legislation of general scope not directed against doctrinal loyalties of particular sects. Judicial nullification of legislation cannot be justified by attributing to the framers of the Bill of Rights views for which there is no historic warrant. Conscientious scruples have not, in the course of the long struggle for religious toleration, relieved the individual from obedience to a general law not aimed at the promotion or restriction of religious beliefs. The mere possession of religious convictions which contradict the relevant concerns of a political society does not relieve the citizen from the discharge of political responsibilities. The necessity for this adjustment has again and again been recognized. In a number of situations the exertion of political authority has been sustained, while basic considerations of religious freedom have been left inviolate. Reynolds v. United States, 98 U. S. 145, 25 L. ed. 244; Davis v. Beason, 133 U. S. 333, 33 L. ed. 637, 10 S. Ct. 299; Selective Draft Law Cases (Arver v. United States) 245 U. S. 366, 62 L. ed. 349, 38 S. Ct. 159, L. R. A. 1918C 361, Ann. Cas. 1918B 856;

> Hamilton v. University of California, 293 U. S. 245, 79 L. ed. 343, 55 S. Ct. 197. In all these cases the general laws in question, upheld in their application to those who refused obedience from religious conviction, were manifestations of specific powers of government deemed by the legislature essential to secure and maintain that orderly, tranquil, and free society without which religious toleration itself is unattainable. * * *"
>
> *Minersville School District* v. *Gobitis*, 310 U. S. 586, 594-595.

In short, the question for determination by this Court is the validity of an educational policy requiring a salute to the flag designed to evoke in children of school age patriotic impulses as affecting those who admittedly entertain conscientious scruples and beliefs that such a policy does violence to their religious rights and scruples safeguarded by the Constitution of the United States. However, as hereinbefore pointed out, this question has been judicially determined by this Court adversely to appellees. We submit that it cannot be denied that honesty and sincerity of purpose, resulting from conscientious scruples, must be conceded appellants in promulgating the regulation of which appellees complain. Recognition has been given to such concession by this Court. "What the school authorities are really asserting is the right to awaken in the child mind considerations as to the significance of the flag contrary to those implanted by the parents." *Minersville School District* v. *Gobitis*, 310 U. S. 586, 590. It is therefore our opinion that patient and thorough consideration has been duly given by this Court to all of the conflicting rights, interests and principles here existing.

II

The Regulation of Appellants Is Not Inimical to Public Safety and Good Order

It is respectfully submitted that this Court has previously determined that the order or regulation of appellants is not inimical to the public safety and good order.

> "The preciousness of the family relation, the authority and independence which give dignity to parenthood, indeed the enjoyment of all freedom, presuppose the kind of ordered society which is summarized by our flag. A society which is dedicated to the preservation of these ultimate values of civilization may in self-protection utilize the educational process for inculcating those almost unconscious feelings which bind men together in a comprehending loyalty, whatever may be their lesser differences and difficulties. * * *"
>
> *Minersville School District* v. *Gobitis*, 310 U. S. 586, 600.

We therefore perceive of no valid objection, within well-established principles enunciated by this Court, which could be now taken to a regulation or order such as that of appellants here considered. *Davis* v. *Beason*, 133 U. S. 333.

III

House Joint Resolution 303 Does Not Supersede The Flag Salute Regulation Promulgated by Appellants

It is earnestly insisted that the Congress of the United States has not yet entered the field of legislation of the character here considered. The Federal law is now precisely as it was at the time of the decision in the case of

Minersville School District v. *Gobitis*. Appellees contend that by the passage of House Joint Resolution 303, Public Law 623, 77th Congress of June 22, 1942, the West Virginia statutes and the regulation promulgated thereunder by appellants, requiring the flag salute ceremony, "have been superseded by an act of Congress" (R. 11-12).

The Congressional Resolution erroneously designated in the bill of complaint as an act of Congress, does not purport to be applicable to the educational policies of a state. It purports to be only a "Joint Resolution to codify and emphasize existing rules and customs pertaining to the display and use of the flag of the United States of America" (Appendix C). It is to be observed that appellees call attention to the fact that this resolution is "merely advisory, not mandatory, and provides no penalty" (R. 12-13). They allege that this joint resolution "does not require a civilian, adult or child, to give any salute whatsoever to the national flag, * * * " (R. 13). Appellees do not admit that they are bound by the provisions of the House Joint Resolution and they do not say that they are willing to comply with the provisions thereof. They fail to call attention to the provisions of Section 5 of the resolution, which is as follows: (Appendix C.)

> "That during the ceremony of hoisting or lowering the flag, or when the flag is passing in a parade or in a review, all persons present should face the flag, stand at attention, and *salute*. Those present in uniform should render the right-hand salute. When not in uniform, men should remove the headdress with the right hand holding it at the left shoulder, the hand being over the heart. Men without hats merely stand at attention. Women should salute by placing the right hand over the heart. The salute to the flag in the moving column

> should be rendered at the moment the flag passes." (Italics ours.)

We doubt seriously that House Joint Resolution is congressional legislation, but, even if it be legislation, the West Virginia statutes complained of and the regulations promulgated thereunder are in no manner and in no degree in conflict with that legislation.

Attention is directed to the fact that the House Joint Resolution does not undertake to make any *new* laws, rules, regulations or customs. We quote from the first paragraph of the resolutions: (Appendix C.)

> "The following codification of *existing* rules and customs pertaining to the display and use of the flag of the United States of America be, and *it is* hereby, *established* • • •" (Italics ours.)

The pronoun "it" is the subject of the verb "is established." The antecedent of the pronoun "it" is the noun "codification." A *codication* was *established* by the joint resolution. No rules and customs were established. *Existing* rules and customs were merely codified.

It is thought that a resolution of such character is nothing more than a recommendation or a declaration of policy on the part of the Congress of the United States and was not intended to possess the force of efficacy of law.

CONCLUSION

It is respectfully submitted:

(1) That appellants' motion to dismiss the bill of complaint should be sustained.

(2) That the flag salute regulation promulgated by appellants and the statutes of West Virginia affording a basis in law therefor, does not violate any of the provisions of the Constitution of the United States.

(3) That this Court by its decision in the case of *Minersville School District* v. *Gobitis*, 310 U. S. 586, has decided all questions raised in this case adversely to the contentions of appellees.

(4) That neither the West Virginia statutes nor the regulation of appellants complained of by appellees has been superseded by any act of the Congress of the United States.

(5) That the judgment appealed from should be reversed.

Respectfully submitted,

IRA J. PARTLOW,
Acting Attorney General of West Virginia,

W. HOLT WOODDELL,
Assistant Attorney General,
Counsel for Appellants.

APPENDIX A

Section 5, Article 2, Chapter 18, Code of West Virginia, 1931:

General Powers and Duties.—Subject to and in conformity with the Constitution and laws of this State, the state board of education shall determine the educational policies of the State, except as to the West Virginia university, and shall make rules for carrying into effect the laws and policies of the State relating to education, including rules relating to the physical welfare of pupils, the education of feeble-minded and physically disabled or crippled children of school age, retirement fund for teachers, school attendance, evening and continuation or part-time day schools, school extension work, the classification of schools, the issuing of certificates upon credentials, the purchase, distribution and care of free textbooks by the district boards of education, the general powers and duties of county and district boards of education, and of school trustees, teachers, principals, supervisors, and superintendents, and such other matters pertaining to the public schools in the State as may seem to the board to be necessary and expedient.

APPENDIX A-1

Section 5-a, Article 8, Chapter 18, Code of West Virginia, 1931, as amended by Chapter 32, Acts of the Legislature, Reg. Sess., 1941:

Child Dismissed, Suspended, or Expelled from School for Failure to comply with Requirements and Regulations Treated as Unlawfully Absent.—If a child be dismissed, suspended, or expelled from school because of refusal of such child to meet the legal and lawful requirements of the school and the established regulations of the county and or state board of education, further admission of the child to school shall be refused until such requirements and regulations be complied with. Any such child shall be treated as being unlawfully absent from the school during the time he refuses to comply with such requirements and regulations, and any person having legal or actual control of such child shall be liable to prosecution under the provisions of this article for the absence of such child from school.

APPENDIX A-2

Section 9, Article 2, Chapter 18, Code of West Virginia, 1931, as amended by Chapter 38, Acts of the Legislature, Reg. Sess., 1941:

Courses of Instruction in History, Civics, Constitutions, Alcoholic Drinks, Narcotics; Textbooks on Health, Biology and Social Sciences to Contain Appropriate Materials on Effects of Alcoholic Drinks and Narcotics; Violations; Penalties.—In all public, private, parochial and denominational schools located within this state there shall be given regular courses of instruction in history of the United States, in civics, and in the constitutions of the United States and of the state of West Virginia, for the purpose of teaching, fostering and perpetuating the ideals, principles and spirit of Americanism, and increasing the knowledge of the organization and machinery of the government of the United States and of the state of West Virginia. The state board of education shall, with the advice of the state superintendent of schools, prescribe the courses of study covering these subjects for the public elementary and grammar schools, public high schools and state normal schools. It shall be the duty of the officials or boards having authority over the respective private, parochial and denominational schools to prescribe courses of study for the schools under their control and supervision similar to those required for the public schools.

* * *

Any person violating the provisions of this section shall be guilty of a misdemeanor, and, upon conviction thereof, shall be fined not exceeding ten dollars for each

violation, and each week during which there is a violation shall constitute a separate offense. If the person so convicted occupy a position in connection with the public schools, he shall also automatically be removed from such position, and shall be ineligible for reappointment to that or a similar position for the period of one year.

APPENDIX B

Regulation of the West Virginia State Board of Education, adopted June 9, 1942:

WHEREAS, The West Virginia State Board of Education holds in highest regard those rights and privileges guaranteed by the Bill of Rights in the Constitution of the United States of America and in the Constitution of West Virginia, specifically, the first amendment to the Constitution of the United States as restated in the fourteenth amendment to the same document and in the guarantee of religious freedom in Article III of the Constitution of this State, and

WHEREAS, The West Virginia State Board of Education honors the broad principle that one's convictions about the ultimate mystery of the universe and man's relation to it is placed beyond the reach of law; that the propagation of belief is protected whether in church or chapel, mosque or synagogue, tabernacle or meeting house; that the Constitutions of the United States and of the State of West Virginia assure generous immunity to the individual from imposition of penalty for offending, in the course of his own religious activities, the religious views of others, be they a minority or those who are dominant in the government, but

WHEREAS, The West Virginia State Board of Education recognizes that the manifold character of man's relations may bring his conception of religious duty into conflict with the secular interests of his fellowman; that conscientious scruples have not in the course of the long struggle for religious toleration relieved the individual from obedience to the general law not aimed at the promotion or

restriction of the religious beliefs; that the mere possession of convictions which contradict the relevant conveins of political society does not relieve the citizen from the discharge of political responsibility, and

Whereas, The West Virginia State Board of Education holds that national unity is the basis of national security; that the flag of our Nation is the symbol of our National Unity transcending all internal differences, however large within the framework of the Constitutions; that the Flag is the symbol of the Nation's power; the emblem of freedom in its truest, best sense; that it signifies government resting on the consent of the governed, liberty regulated by law, protection of the weak against the strong, security against the exercise of arbitrary power, and absolute safety for free institutions against foreign aggression, and

Whereas, The West Virginia State Board of Education maintains that the public schools, established by the legislature of the State of West Virginia under the authority of the Constitution of the State of West Virginia and supported by taxes imposed by legally constituted measures, are dealing with the formative period in the development in citizenship that the Flag is an allowable portion of the program of schools thus publicly supported.

Therefore, be it Resolved, That the West Virginia Board of Education does hereby recog ize and order that the commonly accepted salute to the Flag of the United States—the right hand is placed upon the breast and the following pledge repeated in unison: "I pledge allegiance to the Flag of the United States of America and to the Republic for which it stands; one Nation, indivisible, with liberty and justice for all"—now become a regular part of the program of activities in the public schools, supported in whole or in part by public funds, and that all teachers

as defined by law in West Virginia and pupils in such schools shall be required to participate in the salute honoring the Nation represented by the Flag; provided, however, that refusal to salute the Flag be regarded as an act of insubordination, and shall be dealt with accordingly.

APPENDIX C

House Joint Resolution 303, Public Law 623—77th Congress (second session), passed and approved June 22, 1942:

> Joint Resolution to codify and emphasize existing rules and customs pertaining to the display and use of the flag of the United States of America.

Resolved by the Senate and House of Representatives of the United States of America in Congress assembled, That:

The following codification of existing rules and customs pertaining to the display and use of the flag of the United States of America be, and it is hereby, established for the use of such civilians or civilian groups or organizations as may not be required to conform with regulations promulgated by one or more executive departments of the Government of the United States.

• • •

Sec. 5. That during the ceremony of hoisting or lowering the flag or when the flag is passing in a parade or in a review, all persons present should face the flag, stand at attention, and salute. Those present in uniform should render the right-hand salute. When not in uniform, men should remove the headdress with the right hand holding it at the left shoulder, the hand being over the heart. Men without hats merely stand at attention. Women should salute by placing the right hand over the heart. The salute to the flag in the moving column should be rendered at the moment the flag passes.

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1943

CHARLES ELMORE CROPLEY
CLERK

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1942

No. 591

■

THE WEST VIRGINIA STATE BOARD OF EDUCATION etc., et al.
Appellants

v.

WALTER BARNETTE, PAUL STULL and LUCY McCLURE
Appellees

■

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA

APPELLEES' BRIEF

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TWO—The statutes and regulation in question, providing for compulsory flag-salute ceremony in public schools, when *construed and applied* to facts and circumstances of this case, deny appellees' right to have their children attend the free public schools by requiring the doing of an act contrary to the *due process* and *equal protection* clauses of the Fourteenth Amendment to the United States Constitution 85

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1942

No. 591

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THE WEST VIRGINIA STATE BOARD OF EDUCATION etc., et al.
Appellants

v.

WALTER BARNETTE, PAUL STULL and LUCY McCLURE
Appellees

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APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA

APPELLEES' BRIEF

Opinion Below

The opinion of the United States District Court is reported in 47 F. Supp. 251 and is printed in the record at pages 49 to 54.

Jurisdiction

Jurisdiction of this Court is invoked under Sections 266 and 345 of the Judicial Code [28 U. S. C. 345, 380] allowing direct appeals from a final decree rendered by a district

court granting an injunction and restraining enforcement of a state statute or regulation.

Timeliness

The final decree was entered on October 6, 1942 and the petition for appeal was presented and allowed on October 31, 1942 and within the three months required by statute.

The Statutes

The *statutes* and *regulations*, the validity of which is drawn in question, as construed and applied to appellees and their children, are, respectively:

Section 5, Article 2, Chapter 18 of the Code of West Virginia, 1931, reading in part as follows:

> "Sec. 5. *General Powers and Duties.* Subject to and in conformity with the Constitution and laws of this State, the state board of education shall determine the educational policies of the State, except as to the West Virginia University, and shall make rules for carrying into effect the laws and policies of the State relating to education, including rules relating to . . . the general powers and duties of county and district boards of education, and of [school trustees], teachers, principals, supervisors, and superintendents, and such other matters pertaining to the public schools in the State as may seem to the Board to be necessary and expedient."

Section 5-A, Article 8, Chapter 18 of the Code of West Virginia, 1931, as last amended on Compulsory School Attendance, reading as follows:

> "Sec. 5-A. If a child be dismissed, suspended or expelled from school because of refusal of such child to meet the legal and lawful requirements of the school and the established regulations of the county and/or

state board of education, further admission of the child to school shall be refused until such requirements and regulations be complied with. Any such child shall be treated as being unlawfully absent from school during the time he refuses to comply with such requirements and regulations and any person having legal or actual control of such child shall be liable to prosecution under the provisions of this article for the absence of such child from school."

Section 9, Article 2, Chapter 18 of the Code of West Virginia, 1931, as amended by Chapter 38 of the Acts of the Legislature of 1941, reading in part as follows:

"Sec. 9. In all public, private, parochial and denominational schools located within this state there shall be given regular courses of instruction in history of the United States, in civics, and in the constitutions of the United States and of the state of West Virginia, for the purpose of teaching, fostering and perpetuating the ideals, principles and spirit of Americanism, and increasing the knowledge of the organization and machinery of the government of the United States and of the state of West Virginia. *The state board of education shall, with the advice of the state superintendent of schools, prescribe the course of study covering these subjects for the public elementary and grammar schools, public high schools and state normal schools. It shall be the duty of the officials or boards having authority over the respective private, parochial and denominational schools to prescribe courses of study for the schools under their control and supervision similar to those required for the public schools.*"

REGULATION promulgated by and adopted by the State Board of Education, appellants, herein, on January 9, 1942, requiring that all pupils participate in the flag-salute ceremony, reads as follows:

"WHEREAS, The West Virginia State Board of Education holds in highest regard those rights and privileges guaranteed by the Bill of Rights in the Constitution of the United States of America and in the Constitution of West Virginia, specifically, the first amendment to the Constitution of the United States as restated in the fourteenth amendment to the same document and in the guarantee of religious freedom in Article III of the Constitution of this State, and

"WHEREAS, The West Virginia State Board of Education honors the broad principle that one's convictions about the ultimate mystery of the universe and man's relation to it *is* [are] placed beyond the reach of law; that the propagation of belief is protected whether in church or chapel, mosque or synagogue, tabernacle or meeting house; that the Constitutions of the United States and of the State of West Virginia assure generous immunity to the individual from imposition of penalty for offending, in the course of his own religious activities, the religious views of others, be they a minority or those who are dominant in the government, but

"WHEREAS, The West Virginia State Board of Education recognizes that the manifold character of man's relations may bring his conception of religious duty into conflict with the secular interests of his fellowman; that conscientious scruples have not in the course of the long struggle for religious toleration relieved the individual from obedience to the general law not aimed at the promotion or restriction of the religious beliefs; that the mere possession of convictions which contradict the relevant concerns of political society does not relieve the citizen from the discharge of political responsibility, and

"WHEREAS, The West Virginia State Board of Education holds that national unity is the basis of

national security; that the flag of our Nation is the symbol of our National Unity transcending all internal differences, however large within the framework of the Constitutions; that the Flag is the symbol of the Nation's power; that emblem of freedom in its truest, best sense; that it signifies government resting on the consent of the governed, liberty regulated by law, protection of the weak against the strong, security against the exercise of arbitrary power, and absolute safety for free institutions against foreign aggression, and

"WHEREAS, The West Virginia State Board of Education maintains that the public schools, established by the legislature of the State of West Virginia under the authority of the Constitution of the State of West Virginia and supported by taxes imposed by legally constituted measures, are dealing with the formative period in the development in citizenship that the Flag is an allowable portion of the program of schools thus publicly supported.

"THEREFORE, be it RESOLVED, That the West Virginia State Board of Education does hereby recognize and order that the commonly accepted salute to the Flag of the United States—the right hand is placed upon the breast and the following pledge repeated in unison: 'I pledge allegiance to the Flag of the United States of America and to the Republic for which it stands; one Nation, indivisible, with liberty and justice for all'—now become a regular part of the program of activities in the public schools, supported in whole or in part by public funds, and that all teachers as defined by law in West Virginia and pupils in such schools shall be required to participate in the salute honoring the Nation represented by the Flag; provided, however, that refusal to salute the Flag be regarded as an act of insubordination, and shall be dealt with accordingly."

Also involved here is the construction and application of THE LAW of Almighty God "whose name alone is JEHOVAH", to wit, the first of His ten commandments set forth in Holy Writ at the book of Exodus:

"I am JEHOVAH thy God, who brought thee out of the land of Egypt, out of the house of bondage.

"Thou shalt have no other gods before me.

"Thou shalt not make unto thee a graven image, nor any likeness of any thing that is in heaven above, or that is in the earth beneath, or that is in the water under the earth:

"Thou shalt not bow down thyself unto them, nor serve them; for I JEHOVAH thy God am a jealous God, visiting the iniquity of the fathers upon the children upon the third and upon the fourth generation of them that hate me.

"And showing lovingkindness unto thousands of them that love me and keep my commandments."

—Exodus 20: 2-6, *American Revised Version*

Statement

PROCEEDINGS

Appellees brought this action in the United States District Court at Charleston, West Virginia, to enjoin the enforcement of the foregoing state statutes and regulation of the said Board of Education *as applied to them*, claiming that the *application* of such laws *to them* abridged their rights contrary to the Federal Constitution. R. 11-13.

At the hearing on the application for interlocutory injunction, the parties stipulated to submit the cause for final hearing upon the complaint and motion to dismiss. (R. 49) The material facts alleged in the complaint were admitted true as pleaded.

The trial court rendered its judgment granting the injunction (R. 45-46) and filed an opinion holding the statutes and regulation invalid as construed and applied to appellees. R. 49-54.

FACTS

Appellees and persons for whom they sue are native and legal American citizens residing in almost every county of the State of West Virginia. They have minor children who are required by compulsory education law to attend the public schools within the district where each resides. Long prior to January 1942, and since January 1942, the appellant BOARD OF EDUCATION and its agencies, all public schools throughout the State of West Virginia, required and now require, by the regulation, performance of the above-described flag salute by all pupils in attendance at the public schools, at stated intervals of each week. No provision is made, by the regulation, for exemption of any pupil from the giving of said salute [1] or the reciting of such pledge, for conscience' sake. R. 8, 47.

While the flag-salute ceremony was being performed in

[1] Although the form of the salute is universally approved, it is to be noticed that it is very much like that of the Nazi regime in Germany.

each of the schools, the children of appellees and of other of Jehovah's witnesses stood in respectful silence and declined to participate in the ceremony. They and their parents attempted to have the flag-salute regulation changed so as to allow them to give the following pledge, to wit,

> I have pledged my unqualified allegiance and devotion to Jehovah, the Almighty God, and to His Kingdom, for which Jesus commands all Christians to pray.
>
> I respect the flag of the United States and acknowledge it as a symbol of freedom and justice to all.
>
> I pledge allegiance and obedience to all the laws of the United States that are consistent with God's law, as set forth in the Bible.

and to stand while others saluted the flag and gave the pledge prescribed by the Board of Education. (R. 4, 8, 14) This request of appellees was refused. (R. 8, 14) Upon failure of each pupil to participate in said flag-salute ceremony and give the prescribed salute to the flag of the United States in the manner required by the foregoing Regulation,[2] such children of each appellee and of other of Jehovah's witnesses were excluded, suspended and expelled from the public schools and denied the right to receive an education in any public school of the State of West Virginia. R. 8, 47.

The reason given that children of appellees and of other of Jehovah's witnesses refuse to participate in the foregoing flag-salute ceremony was and is that each is in a covenant with JEHOVAH, the Almighty God, to obey His will. Each of said children conscientiously believes that his failure to believe and obey the precepts and commandments of JEHOVAH laid down in the Bible[3] will result in his eternal destruction at the hand of Almighty God. R. 3, 4, 47, 18-29.

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[2] The current regulation, the one here questioned, was promulgated under and by virtue of authority granted in the foregoing statute, particularly Chapter 38 of the Acts of the Legislature of West Virginia, 1941.

[3] Exodus 20: 2-6, page 6, supra.

Such children and appellees sincerely believe that the act of participating in the flag-salute ceremony or saluting any flag of any nation, including the United States flag, constitutes for such covenant-bound person a violation of the commandment of Almighty God recorded in the Bible book of Exodus, chapter 20, verses two to six, as set forth at page 6, this brief. R. 3-4, 17-43, 47.

Such children and their parents further believe that to participate in the flag-salute ceremony as promulgated by the Regulation aforesaid constitutes *for them* a religious ceremony and rite, and that to salute the flag means to ascribe salvation to the power for which the flag stands; that the flag and governmental power for which the flag stands are of the world and not of JEHOVAH GOD; and since JEHOVAH GOD alone can give salvation to any creature, the act of saluting the flag would thus, *to them*, be a hypocritical ascribing of salvation to the state. The children have been brought up to believe sincerely the above commandments of Almighty God, written in His Book, the Bible. R. 3-4, 17-43, 47.

Appellees, the persons for whom they sue, and their children, are loyal American citizens and obey all the laws of the land that do not conflict with the Supreme Law of Almighty God. R. 4, 14, 38-43.

They believe that their first and highest duty is to JEHOVAH GOD. (R. 2-4) The booklet *God and the State* published by Jehovah's witnesses is made a part of the record. (R. 13, 16-43) It is referred to here for further explanation of the Biblical reason for the action of Jehovah's witnesses and fully explains the position of appellees on the flag salute question. We incorporate the entire booklet herein and make it a part hereof by reference. (R. 16-43) From cover to cover it is filled with scriptural quotations showing that Exodus 20: 2-6 enjoins the true Christian who is one of Jehovah's witnesses from saluting the flag of any nation. This conclusion is not the interpretation of Jehovah's witnesses or of any man but appears to be the inter-

pretation of Jehovah God. Scriptural instances recorded showing the stand taken by Jehovah's witnesses in ancient times on the same issue here involved are given therein to show that God's Law is Supreme and that one in a covenant with Almighty God cannot willingly violate that covenant without suffering everlasting destruction. Historical origin of the compulsory flag-salute is there given, and the facts showing that the Nazis have pushed it to the fore as a means of regimenting the people in continental Europe. The flag salute is shown as an opportune means of false demonstration of patriotism by those who work against the welfare of the country. The booklet contains a summary of the *Gobitis* case from the time it originated in the United States District Court to the judgment of this Court on June 3, 1940. The booklet shows the true meaning of loyalty and establishes that Jehovah's witnesses are faithful and true citizens of this country and fighters for the righteous principles of democracy. The foregoing substitute pledge is offered. (Page 8, supra; R. 39) The booklet concludes with an explanation of the course that must be taken by Jehovah's witnesses on this question regardless of the action taken by the state or nation or agencies thereof. The booklet restates the stand taken by Jesus Christ's apostles as the official statement of Jehovah's witnesses: "We ought to obey God rather than men."—Acts 5: 29.

It is admitted that the refusal of the children of Jehovah's witnesses to participate in said ceremony and salute does not present a *clear and present danger* against proper and regular operation of any public school. It is conceded that there is no danger that other pupils will be thereby induced to become Jehovah's witnesses and join appellees' children in their stand of refusal to salute the flag, because of extreme unpopularity of Jehovah's witnesses. R. 13, 14, 47-49.

The number of children of Jehovah's witnesses in the public schools of West Virginia constituted a very small percentage of the entire school population. R. 9, 13-15.

There is nothing in the faith or practices of Jehovah's witnesses and their children in refusing to salute the flag that is contrary to public morals, health, safety or welfare of either the state or nation. R. 14, 51, 35-36, 39, 49.

Great numbers of children have been expelled from school and denied education in the public schools. Practically all of such expelled children and their parents are financially unable to provide for adequate private instruction. Such children and their parents have been threatened with immediate prosecution under penal statutes prohibiting truancy and delinquency and contributing to delinquency of minors. The sole basis of such threatened prosecution is the fact that said children are denied the right to a public education by reason of their exclusion from school because they refuse to participate in said flag-salute ceremony or to salute the flag as required by the Regulation. It is admitted that the children were otherwise model students and obedient pupils. R. 8, 49.

It was admitted that by reason of their children being deprived of the right to attend the public schools, and the above facts and circumstances, appellees were faced with the clear, present and immediate danger that they would suffer irreparable injury and loss by reason of the appellants' conduct unless the appellants were restrained as requested. R. 10, 49.

Appellees do not have an adequate and sufficient remedy at law in the state courts that is available to them to protect their rights. R. 10-16, 49.

Appellees on three occasions duly applied to the Supreme Court of Appeals of the State of West Virginia for a writ of prohibition against the appellants herein to have the statutes and regulations in question construed and applied and the validity of appellees' objections thereto passed upon and determined. The writ of prohibition is a permissive remedy under practice of West Virginia. In these applications a request was also made to have the court order appellees' children to be permitted to return to school and

give the substitute pledge above and otherwise be excused from the ceremony required by the Regulation. Said Supreme Court of Appeals three times declined to grant said appellees the relief requested. At the time this action was instituted and decided in the court below there was no clear and adequate remedy in the state courts which would afford appellees relief and which would dispose of the federal questions presented as speedily as the remedy here employed. R. 10, 14-16.

Federal Questions Presented

The Record

In the complaint, paragraphs 24 and 25, it is alleged that the foregoing statutes and regulations of the State of West Virginia unconstitutionally abridge rights of the appellees and other of Jehovah's witnesses and their children, contrary to the First and Fourteenth Amendments to the United States Constitution, in that the rights of freedom of speech, freedom of conscience, freedom to worship Almighty God, freedom of the children to attend the public schools, and freedom to direct the moral and spiritual education of the children were denied and abridged. (R. 10-11) The statutes and regulations of the State were held by the Court below to violate the *amendments* above mentioned. The *federal questions* here presented were decided in favor of appellees and the persons for whom they sue. R. 45-54.

Complaint States Cause of Action

Appellants argue that the complaint did not allege a cause of action because "no substantial federal question" was presented. The basis for this argument is that the claimed federal question was unsubstantial, frivolous, and wholly lacking in merit because the same questions had been previously disposed of by prior decision of this court in *Minersville* v. *Gobitis,* 310 U. S. 586. The general rule announced by this court and relied upon by appellants is correct where the prior decision is unanimous and settled but, as in the *Gobitis* case, where the issue remains unsettled the rule does not apply. Justice Brandeis, dissenting in the *Coronado Oil* case (285 U. S. 393, 405), said: "*stare decisis* is not, like the rule of *res judicata,* a universal, inexorable command". Chief Justice Taney stated that "it be regarded hereafter as the law of this court, that its opinion upon the construction of the Constitution is always open to discussion when it is supposed to have been founded in error, and that its judicial authority should hereafter depend altogether on the force of the reasoning by which it is supported." (*Smith* v. *Turner,* 7 How. 283, 470) In view of the unsettled state of the law at the time the complaint was filed, it must be concluded that a "substantial federal question" was presented in the complaint, *Lovering & Garrigues Co.* v. *Morrin,* 289 U. S. 103, 105; *Columbus Ry. Power & Light Co.* v. *Columbus,* 249 U. S. 399.

Points for Argument

ONE

The statutes and regulation in question, providing for compulsory flag-salute ceremony in public schools, when *construed and applied* to facts and circumstances of this case, abridge appellees' and their children's right of freedom of speech, freedom to worship ALMIGHTY GOD, freedom of conscience and freedom to direct the spiritual education and welfare of said children, contrary to the First and Fourteenth Amendments to the United States Constitution.

TWO

The statutes and regulation in question, providing for compulsory flag-salute ceremony in public schools, when *construed and applied* to facts and circumstances of this case, deny appellees' right to have their children attend the free public schools by requiring the doing of an act contrary to the *due process* and *equal protection* clauses of the Fourteenth Amendment to the United States Constitution.

ARGUMENT

ONE

The statutes and regulation in question, providing for compulsory flag-salute ceremony in public schools, when *construed and applied* to facts and circumstances of this case, abridge appellees' and their children's right of freedom of speech, freedom to worship ALMIGHTY GOD, freedom of conscience and freedom to direct the spiritual education and welfare of said children, contrary to the First and Fourteenth Amendments to the United States Constitution.

A

ANCIENT HISTORY of salute to symbols of government and the practice of conscientious men to refuse participation in the ceremony and instead to worship ALMIGHTY GOD alone.

About 1500 B. C., after the Israelites' deliverance by JEHOVAH from bondage under the first world power, Egypt, and immediately following the God-given command recorded at Exodus 20: 2-6, Almighty God called their leader Moses apart into the mountain for conference. While Moses was away to Mount Sinai the Israelites constructed an image. It was a golden calf. They sacrificed to it and worshiped it in violation of the command of JEHOVAH. This unfaithfulness to their covenant obligation Almighty God quickly condemned.—Exodus 32: 1-8, 30-35.

In the days of the second world power of history, Assyria (*about* 700 B. C.), its king Sennacherib came down and laid siege against Jerusalem, the holy city appointed by Jehovah for His people Israel. The people appealed for counsel to Isaiah, one of Jehovah's witnesses. (Isaiah, chapter 37)

The besieging Assyrian forces had standards, concerning which *The International Bible Dictionary* says:

> "The Assyrian standards were emblematic of their religion, and were therefore the more valuable as instruments for leading and guiding men into the army. The forms were imitations of animals, emblems of deities, and symbols of power and wisdom. Many of them were crude, but others were highly artistic and of great cost."

It was therefore but natural that the Assyrian hosts treated those standards with reverence and struck religious attitudes toward them.

There is no Scriptural evidence that God's typical theocratic nation of Israel used such standards in their offensive operations against their heathen foes; and certainly God's covenant people Israel did not perform acts of obeisance or any "religious" practice toward such. (Cf. Psalm 20:5-8) Such would have been abhorrent to them, because they were in a covenant with Jehovah God, which covenant forbade them to worship creatures or man-made objects and authorized worship and adoration of Almighty God alone. The faithful Israelites heeded the words of Jehovah's prophet Moses, to wit:

> "Take ye therefore good heed unto yourselves; for ye saw *no manner of form* [similitude] on the day that JEHOVAH spake unto you in Horeb out of the midst of the fire; lest ye corrupt yourselves, and make you a graven image in the form [similitude] of any figure, the likeness of male or female, the likeness of any beast that is on the earth, the likeness of any winged bird that flieth in the heavens, the likeness of anything that creepeth on the ground, the likeness of any fish that is in the water under the earth; and lest thou lift up thine eyes unto heaven, and when thou seest the sun

and the moon and the stars, even all the host of heaven, thou be drawn away and worship them, and serve them."—Deuteronomy 4: 15-19, *American Revised Version.*

In the time of Daniel (*about* 600 B. C.) at the third world empire's capital, Babylon, Nimrod's city founded by that totalitarian ruler, there was constructed an image or symbol representing the political power or state. The government published a decree that all persons within the realm should salute the image. The *majority* looked upon the practice as proper, for they regarded it as holy because it represented their god, the State. Present at that ceremony were *three men* who refused to bow down or salute the image. They were Jehovah's witnesses, Shadrach, Meshach, and Abednego, who could not salute it because they were in a covenant to obey God rather than men, the State, and were obligated to keep the commandment expressed at Exodus 20: 3-6. For their "high treason" they were denied the right of freedom to worship Almighty God *alone* and were promptly thrown into a red-hot furnace. Because of their faithfulness and refusal to break their covenant with Almighty God, He delivered them unsinged, while the men who threw them into the furnace were consumed by the intense heat.—Daniel, chapter 3.

About 500 B. C., when the Medo-Persian empire dominated the whole world, in the reign of Xerxes (Ahasuerus) a decree went forth that all persons should salute the prime minister, Haman, by bowing down at a certain time. Mordecai, a faithful Jew in a covenant with Jehovah, refused to obey the order because contrary to the command of Almighty God recorded at Exodus 20: 3-6. His refusal brought upon him a judgment to hang by the neck until dead. His faithfulness and refusal to compromise under such pressure brought him deliverance at the hand of Almighty God. —Esther, chapters 3 to 6.

The Israelites' abhorrence to giving obeisance to stand-

ards and even to having the standards of the heathen present in the holy city of Jerusalem is instanced in the days of Pontius Pilate, the Roman procurator or resident governor of Judea who delivered over Jesus Christ to be nailed to the tree at Calvary. Concerning this the Jewish historian Josephus, in his *Antiquities*, Book xviii, 3, 12, and *Wars of the Jews*, ii, 9, 2-4, says in substance as follows:

"One of Pilate's first acts was to remove the headquarters of the army from Caesarea to Jerusalem. The soldiers of course took with them their standards, bearing the image of the emperor, into the Holy City. Pilate had been obliged to send them in by night, and there were no bounds to the rage of the people on discovering what had thus been done. They poured down in crowds to Caesarea, where the procurator was then residing, and besought him to remove the images. After five days of discussion he gave the signal to some concealed soldiers to surround the petitioners and put them to death unless they ceased to trouble him; but this only strengthened their determination, and they declared themselves ready rather to submit to death than forego their resistance to an idolatrous innovation. Pilate then yielded, and the standards were by his orders brought down to Caesarea. No previous governor had ventured on such an outrage. Herod the Great, it is true, had placed the Roman eagle on one of his new buildings; but this had been followed by a violent outbreak, and the attempt had not been repeated. The extent to which the scruples of the Jews on this point were respected by the Roman governors is shown by the fact that no effigy of either god or emperor is found on the money coined by them in Judea before the war under Nero. Assuming this, the denarius with Caesar's image and superscription of Matt. xxii must have been a coin from the Roman mint, or that of some other province."—McClintock and Strong's *Cyclopedia*, Vol. VIII, p. 200.

Christ Jesus when on earth was propositioned to worship the state, render obeisance to the Roman government and

thus escape punishment and persecution. The Devil promised Jesus honor and rulership over *all the kingdoms of the world* if He would bow down and worship him, the Devil, as god of all kingdoms of the earth. The sacred Record of this outstanding example of unbending *exclusive* devotion to Almighty God reads as follows:

> "Again, the devil taketh him up into an exceeding high mountain, and sheweth him all the kingdoms of the world, and the glory of them; and saith unto him, All these things will I give thee, if thou wilt fall down and worship me. Then saith Jesus unto him, Get thee hence, Satan: for it is written, Thou shalt worship the Lord [JEHOVAH] thy God, and him *only* shalt thou serve."—Matthew 4:8-10; cf. Deuteronomy 6:13; Isaiah 8:13.

Throughout the centuries after Christ Jesus there have ever been faithful men who, like Jesus, firmly maintained and refused to surrender, regardless of cost, the right of freedom to worship Almighty God *exclusively* as commanded by JEHOVAH, and declined to submit their conscience to the dictates of the state.

"In the time of the Roman empire, it was customary for the people to burn a pinch of incense before a statue of the emperor. The early Christians, while recognizing the sovereignty of the emperor, refused to perform this ceremony, deeming it idolatrous." (Quoted from Opinion of Supreme Court of the State of Washington, delivered January 29, 1943, in *Bolling* v. *Superior Court for Clallam County*, etc., unanimously declaring unconstitutional the application to Jehovah's witnesses of the compulsory flag-salute statute.)

A less ancient instance of refusal to salute an image or symbol of the state is that of William Tell, one of the movers against the strangling encroachments of the Holy Roman Empire upon peoples of the Alpine provinces. He,

with others, helped to set the cornerstone of the Swiss Confederation in that mountain stronghold. Concerning Tell it is recorded that he boldly refused to salute the hat of Gessler, resident representative of the Austrian tyrant king then leagued with the world-dominant leader of the ecclesiastical hierarchy at the Vatican. The bailiff's hat was placed on a pole in a public place at Altdorf and every person coming to market was required by law to show allegiance to the state by saluting the hat. Because of his refusal, Tell was commanded to shoot an apple from his son's head with an arrow. See *Encyclopedia Britannica*, Vol. 26, pp. 574-576; *Encyclopedia Americana*, Vol. 26 (1942 ed.), pp. 400-401; Roy Elston, *The Traveller's Handbook to Switzerland* (London, Eng., 1929-1930), pp. 21-42, 142.

In more modern times, perhaps the most apposite example is the assertion by the Quakers in England during the seventeenth century of a conscientious scruple against uncovering the head in deference to any civil authority. The Quakers sincerely believed that uncovering the head was an act of worship, and were unable to bring themselves to take off their hats even under circumstances where the general *custom* of the kingdom demanded the gesture. This scruple, however fantastic it may have appeared to the vast majority, was, nevertheless, exercised honestly by a few God-fearing persons. In a standard contemporary work their reason and purpose in doing this is stated, as follows:

> "He that kneeleth, or prostrates himself to man, what doth he more to God? He that boweth, and uncovereth his head to the *creature*, what hath he reserved to the *Creator?* Now the apostle shows us, that the *uncovering of the head* is that which God requires of us in our worshiping of him, 1 Cor. xi. 14."—Barclay, *Apology for the True Christian Divinity*, Proposition xv, Sect. 6 (1676). [Cf. Acts 10:25, 26; Revelation 22:8, 9]

For observing this scruple by refusing to doff their hats in court, many Quakers were punished, although some authorities, such as Charles II, respected their belief and declined to penalize them.

Every child and student of American history knows of the intense persecution and suffering endured by William Penn who firmly refused to salute the King of England by removing his hat in the presence of that monarch—the popular custom and current salute of that day. He founded Pennsylvania as a haven for persecuted Quakers who fled from bitter hostility shown against them in England to the new commonwealth where they found refuge in a "land of liberty".

Men who had been persecuted in England and continental Europe fled from such lands of oppression and came here in a constant stream while they hewed out of the wild forests the beginning of this Nation.

The founding fathers who wrote the Bill of Rights wisely wrote in plain but general terms the injunctions contained in the First Amendment so as to guarantee to their posterity freedom of conscience and protect them against the terrible persecutions from which they and their forefathers fled. There can be no doubt that allowances were intended to be made for men with "crochety" beliefs, such as William Penn and his brethren, who would not salute the state or any image thereof, animate or inanimate. There can be no doubt that the writers of the Constitution did intend that this guarantee of the right of supremacy of conscience in proper fields should not be impaired by judicial amendment, but should be enforced by judicial decree.

B

History of modern-day salute to the flag, and the right of Jehovah's witnesses conscientiously to refuse to participate therein.

When flag saluting was introduced at public school ceremonies in 1892, four hundred years after Christopher Columbus landed on American shores, James B. Upham, of Malden, Mass., wrote a pledge of allegiance which gained wide currency through its publication in *The Youth's Companion* magazine. (See *Encyclopedia Americana*, Vol. 11 [1942 ed.], p. 316.) Thereupon a campaign was launched to have the United States flag placed in every school house and that it be saluted ceremoniously by all school children on the anniversary of the landing of Columbus. In the fall of 1892, the flag-salute ceremony appeared in this country at the National Public School celebration.

In 1907 the first compulsory flag-salute regulation appeared in Kansas. Thereafter, until more recent years, compulsory participation in the ceremony did not increase or prosper; on the contrary, it disappeared until the rise of "fascism" and "nazism" in continental Europe. Concurrently with the spread of totalitarianism various states of the Union passed laws requiring the compulsory flag salute in schools. Between 1935 and 1939 eighteen states saw fit to expel children who refused to salute the national flag because of conscientious objection. Since the *Gobitis* decision (*Minersville Dist.* v. *Gobitis*, 310 U. S. 586) in June 1940 and the present national emergency, children who refuse to salute the flag have been expelled in every state of the Union.

History of the flag-salute regulation is discussed in greater detail by Judge Clark in his opinion in the *Gobitis* case (CCA-3, 108 F. 2d 683). In recent years much has been said in controversy concerning the attitude of Jehovah's witnesses toward flags. No real American patriot can truthfully accuse Jehovah's witnesses of disrespect to the flag

of the Nation, but in consequence of the malicious designs of enemies of these sincere followers of the Lord Jesus Christ, their Scriptural attitude, which is one of proper respect, has been greatly misrepresented and grossly misinterpreted. The position and view of Jehovah's witnesses toward the emblem of the Nation was well stated by the late Judge Rutherford at Detroit, Michigan, in 1940, shortly after mob violence began to sweep the country. That spokesman for Jehovah's witnesses then publicly said:

> "The flag is a symbol of a government the principles of which were established on righteousness by men who loved God."

He pointed out also that Jehovah's servants are not against the flag nor the things for which it stands. On the contrary, they respect the flag and the high principles for which it is the symbol. Such respect they show, without hypocrisy, by obeying conscientiously all laws of the land which are in harmony with righteousness and not in conflict with laws of the Supreme Being, and which laws do not require them to violate their covenant with Almighty God, JEHOVAH. So doing, they render first unto God that which is God's and unto Caesar that which is Caesar's.—Matthew 22:21.

In *Halter* v. *Nebraska*, 205 U. S. 36-41, this honorable Court held that the flag "is an emblem of sovereignty".

To many persons the saluting of a national flag means nothing. To a sincere person who believes in God and the Bible as His Word, and *who is in a covenant with Almighty God to do His will exclusively*, it means much. To such person "sovereignty" means the supreme authority or power. Many believe that "the higher powers", mentioned in the Bible at Romans 13:1, means the "sovereign state"; but to the Christian this means *only* JEHOVAH GOD and His Son, Christ Jesus, Jehovah's anointed King. They, Father and Son, are THE HIGHER POWERS, to whom all must be subject and joyfully obey.

Concerning the flag *The Encyclopedia Americana*, Volume 11 (1942 ed.), page 316, says:

> "The flag, like the cross, is sacred. . . . The rules and regulations relative to human attitude toward national standards use strong, expressive words, as, 'Service to the Flag,' . . . 'Reverence for the Flag,' 'Devotion to the Flag.'"

Webster's International Dictionary defines the words above used as follows:

> SACRED, set apart by solemn religious ceremony
> DEVOTION, a form of prayer or worship
> REVERENCE, veneration, expressing reverent feeling, worship
> SALUTE means to greet with a kiss or bow and courtesy, the uncovering of the head, a clasp or wave of the hand or the like; . . . to honor formally or with ceremonious recognition. (See Century Dictionary, page 5321.) To greet with a sign or welcome, love or deference, as a bow and embrace, or a wave of the hand. (Webster)

It is conceded that the flag is a symbol of the State, an image which represents the State.

Under the word "image" this comment is given by Webster: "Image, in modern usage, commonly suggests religious veneration."

According to the Bible, to bow down to a symbol or image includes all postures or attitudes toward the image, even a kiss. See 1 Kings 19:18; Hosea 13:2; Job 31:25-27.

Any token of reverence is a bowing down to. See Webster's International Dictionary under the word "bow".

It appears from the recognized lexicographers that saluting a flag is a religious formalism, as much so as when the ancient Assyrians and Egyptians showed respect to

their standards. According to the Bible, there cannot be the slightest doubt about it, because by such salute there is bestowed upon the image or thing, reverence, devotion, and a form of prayer or worship, and which thing or image or that which it represents is regarded as *sacred*.

Appellees sincerely believe the Word of God and conscientiously believe that saluting a flag is a violation of His Law. Any willful disobedience to God's Law means *to them* complete or eternal destruction, at the hand of Almighty God. "For Moses truly said unto the fathers, A prophet shall the Lord your God raise up unto you of your brethren, like unto me; him shall ye hear in all things, whatsoever he shall say unto you. And it shall come to pass, that every soul, which will not hear that prophet, shall be destroyed from among the people."—Acts 3:22, 23; Deuteronomy 18:15.

A rule which compels school children who are Jehovah's witnesses daily to participate in a formal ceremony by placing the hand over the heart (which is symbolic of loving devotion) and then extending the hand in a salute to a flag, a symbol of the State, and at the same time repeating formal words by which the State is recognized as the "higher power" and thereby attributing to the State protection and salvation, is compelling those children to adopt and practice what *to them* is a religious ceremony. To those children who are in a covenant with Jehovah God to obey His will, such formal ceremony or practice is compelling them to perform an act of idolatry, contrary to the command of Almighty God, which command such children conscientiously believe, rely upon and cannot ignore or transgress.

This raises the question, What is a *religious* belief? Based upon the Bible, the proper definition of religion is this: A formal ceremony of reverence, adoration, devotion, or praise, practiced or indulged in by human creatures and directed toward, or bestowed upon some creature as a higher power, real or fancied, thereby attributing to such higher power sovereignty, protection and salvation, is a

religion. Since such ceremony ignores the specific commandment of Almighty God, that ceremony is idolatry.—Matthew 15:1-9; Acts 10:21-26; 17:16-29; Revelation 19:10; 22:8, 9; Exodus 20:12; Isaiah 29:13; 44:8-10; John 4:23.

The foregoing Bible definition of religion is further supported by what follows: Paul, at one time a Pharisee and as such a practitioner of religion, said, "I am a Pharisee, the son of a Pharisee." (Acts 23:6) When before King Agrippa, he said: "After the most straitest sect of our religion I lived a Pharisee." (Acts 26:5) After Paul became an active follower of the Lord Jesus Christ, an apostle of His and one of Jehovah's witnesses, he wrote words recorded in the Bible at Galatians 1:13, 14, "For ye have heard of my conversation in time past in the Jews' religion, how that beyond measure I persecuted the church of God, and wasted it; and profited in the Jews' religion above many my equals in mine own nation, being more exceedingly zealous of the traditions of my fathers." Religion is taught by the traditions of men. (Matthew 15:1-9) God's worship, taught by Jesus Christ, is based entirely upon the Word of Almighty God, the Bible, which is the truth.—John 17:17; 18:37; 8:32, 40; Matthew 4:10; Psalm 119:142.

Should not all citizens be loyal to the country in which they live? Emphatically YES. Jesus stated the correct rule, to wit: "Render to Caesar the things that are Caesar's, and to God the things that are God's." (Mark 12:17) Caesar was the totalitarian, arbitrary ruler representing the government of Rome. He stood for the State. The Lord Jesus Christ declared that everything to which the State was entitled, such as payment of ordinary taxes, should be rendered unto the State. He then added that everything to which God is entitled should be rendered unto God. Clearly that means God is Supreme, that His Law is above the law of the State, and that laws of the State which are in harmony with God's Law should be readily obeyed. Appellees follow that rule. They are diligent to obey every law of the State not in conflict with the Law of Almighty God. Any rule or

law enacted in the State of West Virginia that is contrary to God's Law is void.

Some contend that refusal to salute a flag is not a conscientious belief reasonably supported in the Bible. So to hold is wrong, because the law of the United States and of this Court specifically define that no person has the right to say whether or not the act of another is not a genuinely obedient act of worship of Almighty God. See *Reynolds* v. *United States*, 98 U. S. 145, 162, where this Court cites with approval the Virginia Statute for Religious Freedom, the preamble of which defines religious freedom, as follows:

> "'that to suffer the civil magistrate to intrude his powers into the field of opinion, . . . is a dangerous fallacy which at once destroys all religious liberty', and 'it is time enough for the rightful purposes of civil government for its officers to interfere when principles break out into overt acts against peace and good order'."

In July 1942 the Kansas Supreme Court, in the case of *State* v. *Smith and Griggsby*, 155 Kans. 588, 127 P. 2d 518, held that the compulsory flag-salute regulation, when applied to Jehovah's witnesses, violated the Kansas Bill of Rights granting freedom of worship of Almighty God and freedom of speech. That court said:

> "We are not impressed with the suggestion that the religious beliefs of appellants and their children are unreasonable. Perhaps the tenets of many religious sects or denominations would be called reasonable, or unreasonable, depending upon who is speaking. It is enough to know that in fact their beliefs are sincerely religious, and that is conceded by appellee. Their beliefs are formed from the study of the Bible and are not of a kind which prevent them from being good, industrious, home-loving, law-abiding citizens. Upon this point the evidence is clear."

It is noteworthy that Kansas, the first state (1907) to enact compulsory flag-salute legislation, in 1942 became the first state to declare such compulsory regulation invalid as to Jehovah's witnesses. And furthermore, that the Kansas Supreme Court flatly refused to follow the *Gobitis* decision, holding that the Kansas Bill of Rights was not as weak as the Federal Bill of Rights 'watered down' by the Court in the *Gobitis* case.

To hold otherwise is to make freedom of worship an uncertainty. It would depend on the religious complexion of the particular individual who occupied the bench and not on the fundamental concept of liberty, to wit, that the courts would never enter into the field of conscience, and that all "religious" beliefs will be conceded as true.

The *way* of worshiping Almighty God as done by appellees and Jehovah's witnesses is commanded by the written Law of ALMIGHTY GOD. God's Law is supreme! This rule is recognized by Blackstone in his *Commentaries*. (Chase 3d ed., pp. 5-7) See also Cooley's *Constitutional Limitations*, 8th ed., p. 968. Appellees greatly desire to have life and to live, and therefore each of them must serve Almighty God; for it is written that God is the fountain of life. (Psalm 36:9) One who desires to live must obey God's law. (John 17:3) Appellees and their children stand in the same position as Jesus Christ's apostles who were haled before magistrates and ordered to discontinue their preaching the gospel and for their refusal to "heil" or salute Caesar and the Jewish clergy. Those apostles told the court, "We ought to obey God rather than men." (Acts 5:17-42) Thereafter, as it is written concerning those faithful followers of Jesus Christ, "daily in the temple, and in every house, they ceased not to teach and preach Jesus Christ."—Acts 5:42.

In *Watson* v. *Jones*, 80 U. S. 728, the principle is stated thus:

> "In this country the full and free right to entertain any religious belief, to practice any religious prin-

ciple, and to teach any religious doctrine which does not violate the laws of morality and property, and which does not infringe personal rights, is conceded to all. The law knows no heresy, and is committed to the support of no dogma, the establishment of no sect."

Since it cannot be shown that the conduct of appellees and their children involves a violation of the laws of morality, infringes personal rights or presents a case where there is *a clear and present danger* that the government will be overthrown by violence, the application of the statutes and regulations in question wrongfully deprives appellees of the aforesaid constitutional rights. Other statutes, concededly valid on their face, when applied to conduct of Jehovah's witnesses have been declared unconstitutional.

We suggest that no American court or executive agency should presume to tell any person that he is wrong in his opinion as to how he may best serve the God in whom he believes. It should, we submit, be deemed inadmissible for a court to brush aside a sincere conscientious objection because the same scruple is not held by most of the people, or because in the court's own view the scruple is theologically inapt.

Neither the legislative nor the judicial department of the American system of government has power to declare that a given practice does not and cannot carry a religious significance, in the face of an individual's sincere and honest determination that *for him* a religious significance exists. To hold otherwise and thus to deny the right of private judgment as to what carries a "religious" meaning would, we submit, strike at the heart of religious freedom.

The issue as to whether the individual should be the sole judge of his own religious belief is a very old one. For centuries, various sects have honestly ascribed religious significance to acts and ceremonies that, to the vast majority held no religious meaning whatever.

It seems that the judicial unwillingness of some of the Justices of this Court who joined in the majority opinion in the *Gobitis* case and failed to concede the religious nature of the salute arises largely from the novelty and strangeness of the particular objection here made to it, and from the fact that Jehovah's witnesses are a comparatively small group. Supposing that this same objection had been raised by a known and respected group such as the Quakers, is it not possible or probable that the courts would have recognized the actuality of the religious significance attributed to the salute? Or if one of the largest religious denominations should have adopted the construction of God's commandment which is believed and taught by Jehovah's witnesses, so that hundreds of thousands of American citizens sincerely ascribed religious significance to the flag salute, is it not most probable that the majority of this Court would have had no difficulty in recognizing such significance?

The record of history shows that the existence and seriousness of beliefs formed from the study of the Bible are not to be measured by the current opinions of the time. History shows that the existence of "religious" scruples lies in truth and fact within the breast of the individual and nowhere else; and no current opinion or fiats of legislatures or courts have ever been able to establish that a particular act or ceremony has no religious significance when the individual himself asserts the contrary.

The present dominance of totalitarian ideas in other parts of the world suggests that an extension of legislative power in this direction should be viewed with suspicion and, *in the absence of a showing of clear necessity*, should be condemned as a deprivation of individual liberty without due process of law.

It is important to recognize that the *compulsory* flag salute is an entirely different thing from the *voluntary* salute.

If a person desires to salute the flag or to "heil" men, that is HIS privilege and no human power can properly

interfere with his so doing. But there is a *vast difference* between such a person and one who has made a *solemn covenant to be obedient to Almighty God*, the breaking of which covenant is IDOLATRY. Appellees and their children are in a covenant to be obedient to Almighty God; and this is conceded. They are conscientious in their belief and practice. That is conceded. In all good conscience they render obedience to the laws of the State, when such laws do not violate God's Law. They fully recognize and believe that one who voluntarily breaks his covenant with Jehovah God will suffer everlasting destruction.

The difference may be illustrated by the familiar custom that a gentleman raises his hat upon meeting a lady of his acquaintance on the street. The gesture is ordinarily regarded as a simple token of courtesy and its omission may lead to disapproval socially. It does not follow, however, that a statute *requiring* the gesture would be constitutional, especially in the face of a "religious" objection. If a Quaker should object to the ceremony on the religious ground suggested in the quotation from Barclay set out at page 20, supra, the invalidity of the requirement *as to him* would seem clear.

C

Jehovah's witnesses are not a sect or cult as are popular recognized religions, but are Christians following Jehovah God and no man. They have no earthly leader.

A *sect* is defined as a religious order or group having in common an earthly leader, or distinctive doctrine, or way of thinking based on doctrines and precepts handed down by man to man.

Jehovah's witnesses do not come within the definition of a sect or a cult. Jehovah's witnesses are those who bear testimony to the supremacy of Almighty God "whose name alone is JEHOVAH". (Psalm 83:18) They declare His name and His revealed purposes concerning His creatures.

They have no human leader. No man organized them. They are not a recently organized group. Jehovah's witnesses have been active on earth at all times during the six thousand years last past. They are those who recognize their Maker, Almighty God, as the Supreme ONE of all time, past, present and future, whose Chief Witness was and is His faithful Son, the Lord Jesus Christ, whose high position of leadership was typified and foretold by Jehovah's faithful servant, Moses, more than three thousand years ago. (Deuteronomy 18: 17-19; Acts 3: 22, 23) Jesus Christ's apostle Paul, who was one time a member of the supreme court of Jerusalem, in the eleventh chapter of Hebrews submits a long list of such men, commencing with Abel, who was slain by his brother Cain. All of those are designated by the apostle as *witnesses* for Almighty God, JEHOVAH; and their course of faithful obedience to the Supreme One is set forth as an example to every one who follows in the footsteps of the Lord Jesus Christ. The prophecy of Isaiah, written about three thousand years ago, expressly calls all men who are in a covenant to do the will of Almighty God and who fulfill that covenant *Jehovah's witnesses*. Jehovah Himself so names them. It is fair to this Court, therefore, that we state that appellees are not here representing some religious sect. In this land there have been Jehovah's witnesses ever since the founding of this nation. Every person who has stood for God and His Kingdom under the Lord Jesus Christ, is one of them.

The United States has been declared to be a Christian nation by this Court. In *Holy Trinity Church* v. *United States*, 143 U. S. 457, after a review of the authorities and history, it is said:

> "These and many other matters which might be noticed add a volume of unofficial declarations to the mass of organic utterances that this is a Christian nation."

In the case of *Watson* v. *Jones*, 80 U. S. 728, it is said:

> "The law knows no heresy, and is committed to the support of no dogma, the establishment of no sect."

The converse of this is true also. This Court will not permit *Christianity* to be attacked, persecuted and discriminated against while the recognized religious sects and their followers are permitted to enjoy the fundamental rights, privileges and freedoms guaranteed by the First Amendment.

We think that what Mr. Justice Roberts said in the case of *Cantwell* v. *Connecticut*, 310 U. S. 296, is appropriate here, to wit,

> "In the realm of religious faith, and in that of political belief, sharp differences arise. In both fields the tenets of one man may seem the rankest error to his neighbor. To persuade others to his own point of view, the pleader, as we know, at times, resorts to exaggeration, to vilification of men who have been, or are, prominent in church or state, and even to false statement. But the people of this nation have ordained in the light of history, that, in spite of the probability of excesses and abuses, these liberties are, in the long view, essential to enlightened opinion and right conduct on the part of the citizens of a democracy.
>
> "The essential characteristic of these liberties is, that under their shield many types of life, character, opinion and belief can develop unmolested and unobstructed. Nowhere is this shield more necessary than in our own country for a people composed of many races and of many creeds."

D

When applying the "clear and present danger" test the compulsory enforcement of the regulation cannot be sustained.

The admitted facts show that the refusal to participate in the ceremony does not involve a violation of the law of morals or present any other exception authorizing invasion of the right. The allegations in the complaint, admitted by the appellees to be true, establish that there is *no clear and present danger* that interests of the state or nation will be affected. It is therefore the duty of the Court to declare the regulation unconstitutional as construed and applied.

Before this inherent right of freedom to worship can be encroached upon there must be presented some *clear and present danger* that the act of refusal to salute the flag will immediately invade rights of others and be immediately inconsistent with the peace or safety of the State. This rule is very clearly exemplified in the case of *Bridges* v. *California*, 314 U. S. 252. Here we adopt that entire opinion as our further argument here. We also refer to the dissenting opinion of Justice Brandeis in *Whitney* v. *California*, 274 U. S. 357, 372, and *Schenck* v. *United States*, 249 U. S. 47, 52, where he said:

> "The question in every case is whether words used [or refusal to act] in such circumstances are of such a nature as to create a *clear and present danger* that they will bring about the substantive evils that Congress has a right to prevent." [Italics added]

A fair application of the provisions of the First Amendment does not permit this Court to go as far as it did in the *Gobitis* case. The *clear and present danger* test does not support the conclusions of such case. The State can only intervene when there is an abuse of the exercise of the right of conscience. Freedom of worship is not abused un-

less and until there is a clear and present and immediate danger that the government will be overthrown by force and violence or that the educational processes will be destroyed and impaired by granting the children here their liberty of conscience. The admitted facts eliminate any such possibility from consideration here. It is to be noticed that the *Gobitis* decision justifies the abridgment in that case because of the possible tendency of the flag salute toward "cohesive sentiments", "continuity of a common life", "common feelings", "unifying sentiment", etc., all of which *possible tendency* doctrines are from the Eighteenth Century doctrines applied under the old common law in the days of censorship, license of the press and speech, and supremacy of the legislature, which are wholly at variance with present-day principles of freedom established in decisions of this Court. The *Gobitis* case doctrine permits the government to go outside its proper field of acts, present, probable or possible, into the field of ideas and opinion, which cannot be invaded under any circumstances, and to condemn them by the judgment of a judge, jury, school board, etc., who, concerning a doctrine they dislike, would rule it to be so likely to cause harm some day that it had better be nipped in the bud.

Comparing the *Gobitis* doctrine with the doctrine of *clear and present danger*, it is well to consider the words of Mr. Justice Black, speaking for this Court, in *Bridges* v. *California*, supra:

> "No purpose in ratifying the Bill of Rights was clearer than that of securing for the people of the United States much greater freedom of religion, expression, assembly, and petition than the people of Great Britain had ever enjoyed. . . . Ratified as it was while the memory of many oppressive English restrictions on the enumerated liberties was still fresh, the First Amendment cannot reasonably be taken as approving prevalent English practices. On the contrary,

> the only conclusion supported by history is that the unqualified prohibitions laid down by the framers were intended to give to liberty of the press, as to the other liberties, the broadest scope that could be countenanced in an orderly society."

The *clear and present danger* test permits the development "unmolested and unobstructed" of the "many types of life, character, opinion and belief" which "may seem the rankest error to his neighbor". It avoids the risk of suppressing disagreeable truth and the denial of education to children with "crochety beliefs" so long as there is no imminent danger of the beliefs or practices impairing the interest which the state is designed to protect. By applying and maintaining this principle only can the nation survive as a democracy with freedom for all. The very best way to increase discontent among the people, impair national unity, destroy cohesion of the people and to destroy the self-confidence of the people is to allow the suppression of a small minority under general statutes and regulations of this sort so as to deny children proper education. If it can be done to Jehovah's witnesses, then any reasonable person would know that it can be done to a group less unpopular until freedom of conscience had been suppressed to all except those in favor of the political power in office. The threat thus received by true followers of Jesus Christ under general statutes and regulations of this sort impairs democracy in this country. Allowance of children with "crochety beliefs" in schools is to be welcomed, not feared, even if it casually involves the right of such children to be excused for conscience' sake from such ceremonies in question. In this connection, see the dissenting words of Mr. Justice Holmes, in *United States* v. *Schwimmer*, 279 U. S. 644, 654:

> "If there is any principle of the Constitution that more imperatively calls for attachment than any other

it is the principle of free thought—not free thought for those who agree with us but freedom for the thought that we hate."

The safety of the State is placed in greater danger in the *long run* by a denial of the right of education to thousands of children because of their conscience. It is a known fact that education in public free schools has contributed more to the progress, success and enlightenment of the United States than any other one thing. It has afforded to the poor and weak an equal opportunity to learn with the rich and wealthy. In other lands education has been the prerogative only of the ultrarich and wealthy and those who suffered poverty remained in a pall of ignorance from the day of their birth to the time of death, which condition has done more to hold back other nations while the United States, with free public education for all which stirred up the minds of its young to action and new discoveries in science, art, etc., jumped ahead in the field of commerce, learning, science and art above all other nations in the earth. Therefore free public school education for all children, regardless of whether the parents are rich or poor, popular or unpopular, bond or free, white or black, is of far greater importance to the welfare and progress of the nation than is the regimentation of the children at school by forcing "conscientious objectors" to surrender their allegiance to Almighty God, the Giver of life itself, as a condition precedent to enjoying the facilities guaranteed to all. The fact that education is made compulsory and punishment is provided for parents who fail to provide the education in every state of the Union proves the answer to the question. Public education for the children is of greater importance than forcing them to salute the flag.

It is a known fact that there are many friendly aliens in the country who do not give allegiance to this government and who are allowed to attend the schools and other-

wise enjoy rights of education, etc. Also there are many enemy aliens residing in the land who are permitted to enjoy rights and privileges of education, etc., on an equal basis with citizens. The exception to this is the interned dangerous enemy alien and the case of the Japanese in the defense areas along the west coast. Several hundred thousand Italian aliens were restored to their rights of friendly aliens by order of the Attorney General. Even this Court unanimously refuses to deny to the enemy Japanese alien his right to protect his legal rights in the courts. All the foregoing democratic liberties are accorded to enemy aliens because there is no clear, present and immediate danger to the nation in this *time of war* by allowing such liberty to such aliens. We submit that if this fairness and liberality can be shown the enemy alien, then why cannot this court secure to innocent, inoffensive and harmless children of Jehovah's witnesses, native-born American citizens, the protection of their constitutional and legal rights? Surely no one who is in possession of all his endowment of reason, justice and mercy would have the hardihood to contend that a little child, courageous, bold and fearless in his unbreakable devotion to Almighty God presents a greater danger to the nation by refusing to violate his conscience through saluting the flag than do the hundreds of thousands of enemy aliens, lo millions, who are in possession of liberty and freedom while the nation battles their fatherland for the preservation of the four freedoms.

E

The inherent, constitutional and absolute power of the parent to direct the spiritual education of the child, and his power to direct the secular education of the child in public and private schools, is recognized as superior to the right of the State declared in regulations or statutes, and has been recognized and sustained by this and other courts.

Marriage and childbearing is God's arrangement for all humankind that shall live on the earth. (Hebrews 3:4) It is beyond the power of the State to interfere with or abridge the right of all persons within its boundary to *procreate*. (Genesis 9:7; Psalm 127:3) Even this right cannot be denied to criminals. *Skinner* v. *Oklahoma*, 316 U.S. 535. *A fortiori*, the State cannot interfere with and abridge the parents' right to bring up children in a way acceptable to their own judgment so long as it is not inimical to the welfare of the children or the well-defined interest of the state.

The children must be taught by the parents to be obedient to the Lord and His commandments or rules found in the Bible. Upon the parents is placed the duty to teach their children morality, honesty, integrity, obedience and meekness and, above all, the commandments of Almighty God, JEHOVAH.

Upon all parents who are in a covenant to do God's will there is laid the duty and specific obligation to teach their children the Word of God and it is the duty of the children to obey their parents who give such instruction. The parent will be diligent to bring his children to congregations where the commandments of Almighty God are studied and discussed. The children are p mitted to participate therein so that they might learn the way of righteousness and how they might receive life everlasting. When Moses stood before Jehovah's typical covenant people on the plains of Moab and delivered the instruction from Jehovah he knew that soon thereafter the children would take the place of

their parents in the ranks of God's nation. Forcefully he urgently reminded the parents of their duty to their children. He urged upon them diligence and faithfulness in teaching the truth to their children. That was important then; the fulfillment thereof is of greater importance now. See Deuteronomy 4:9, 10; 6:5-8; 11:18-21; 12:28; 31:10-13; 32:46. The apostle of Christ Jesus also states the command thus: "And, ye fathers, provoke not your children to wrath; but bring them up in the nurture and admonition of the Lord." (Ephesians 6:4) The children also are commanded: "Children, obey your parents in the Lord; for this is right. Honour thy father and mother; which is the first commandment with promise; that it may be well with thee, and thou mayest live long on the earth."—Ephesians 6:1-3.

"Nurture" means to discipline and train the child in the way of righteousness; and such way of righteousness God has marked out in His Word. The words "right" and "righteous" are from the same root word and mean the same thing. "Admonish" means to teach and instruct; to counsel and advise the children of and in accord with the expressed will of God set forth in the Bible. Parents who failed thus to instruct their children would be provoking their children to do wrong or to wrath.

To permit the child to *believe* in righteousness and to refrain from *practicing* right is entirely wrong. "For as the body without the spirit is dead, so faith without works is dead also." (James 2:26) "Let your light so shine before men, that they may see your good works, and glorify your Father which is in heaven." (Matthew 5:15, 16) It is therefore the duty and privilege of parents and children to *practice what they preach* by consistently acting as Jehovah's witnesses, and consistently refusing to salute the flag of any nation.

It cannot be said that children are too young to be permitted thus to worship and serve Jehovah God. The State has no authority or power to tell a child at what age it can

begin practicing the requirements of Almighty God taught it by the parent. Thus to allow the State to intervene would forever destroy and end the unalienable American heritage of the right to maintain a home, raise children and follow generally the pursuits of happiness enjoyed by a free people. The State can intervene with respect to the care and education of the child only when the parent "neglects" or "misuses" the child to such an extent as to endanger its welfare and the interests of the State. So long as the parent does not violate this fundamental rule, the State cannot interfere with the "religious" practices of the parents and children.

The words of Mr. Justice Page of the New Hampshire Supreme Court (*In re Lefebvre*, 20 A. 2d 185) seem appropriate and fitting here:

> "Loving parents who do their best for their children in support, nurture and admonition are of more worth than pecuniary means. Righteous and generous motives may be of more importance than notions that chime with majority opinions of what is good form or what is the best method of teaching patriotism. . . . But in view of the sacredness in which the State has always held freedom of religious conscience, it is impossible for us to attribute to the legislature an intent to authorize the breaking up of family life for no other reason than because some of its members have conscientious scruples not shared by the majority of the community, at least provided those scruples are exercised in good faith, and their exercise is not tinged with immorality or marked by damage to the rights of others."

See also *Reynolds* v. *Rayborn*, 116 S. W. 2d 836, where Chief Justice Jackson of the Texas Court of Civil Appeals said:

> "History is replete with the bigotry, intolerance, and dogmatism of religious sects, and the pages there-

of are strewn with martyrs who died for their faith. The divergence in creeds, the evils growing from a union of church and state, and the conflicts for supremacy waged between the two were studied and considered by the colonial pioneers who established the independence of these United States. They profited by peoples whose experiences in government had failed, as well as by the achievements of those whose governments had been more successful, and to avoid the griefs and disasters arising from the bigotry and religious intolerance of the preceding ages, they provided in our fundamental laws, Amendment 1 of the Constitution of the United States, that the 'Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof.' . . .

"The flag is emblematic of the justice, greatness and power of the United States—these, together, guarantee the political liberty of the citizen, but the flag is no less symbolic of the justice, greatness, and power of our country when they guarantee to the citizen freedom of conscience in religion—the right to worship his God according to the dictates of his conscience. Beyond my comprehension are the vagaries of people who claim and accept the protection of their government in order to worship God according to the dictates of their conscience, but refuse to salute their country's flag in recognization of such protection. Yet, however reprehensible to us such conduct may be, their constitutional right must be held sacred; when this ceases, religious freedom ceases." [4]

The right of the parent to direct the education of the child in public or private schools has been fully recognized by this Court. See *Meyer* v. *Nebraska*, 262 U. S. 390, where

[4] See the recent case of *Stone* v. *Stone*, ... P. 2d ..., decided Jan. 25, 1943, by the Supreme Court of Washington, involving the same question, and which court refused to follow the *Gobitis* case.

was set aside a conviction of a person who taught the German language to children in public schools contrary to a state statute. It was held that the statute infringed the right of the individual to marry, establish a home, bring up children and to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men. See also *Pierce* v. *Society of Sisters*, 268 U. S. 510, where the Oregon Compulsory Education Law requiring all children to attend public schools unreasonably abridged the constitutional right of parents to direct the upbringing and education of children under their control. Also see *Allgeyer* v. *Louisiana*, 165 U. S. 578, 589; and *Berea College* v. *Kentucky*, 211 U. S. 45, 67.

The Fourteenth Amendment to the United States Constitution guarantees not only freedom from unlawful physical restraint, but also the right to enjoy the facilities of the State on *equal* terms with others. This principle is well stated by this Court in *Allgeyer* v. *Louisiana*, supra:

> "The liberty mentioned in that amendment means not only the right of the citizen to be free from the mere physical restraint to his person, as by incarceration, but the term is deemed to embrace the right of the citizen to be free in the enjoyment of all his faculties; to be free to use them in all lawful ways; to live and work where he will; to earn his livelihood by any lawful calling; to pursue any livelihood or avocation, and for that purpose to enter into all contracts which may be proper, necessary and essential to his carrying out to a successful conclusion the purposes above mentioned."

In another case, *Berea College* v. *Kentucky* (1908), supra, this Court, speaking through Mr. Justice Harlan, said:

> "The capacity to impart instruction to others is given by the Almighty for beneficent purposes and its

use may not be forbidden or interfered with by Government—certainly not, unless such instruction is, in its nature, harmful to the public morals or imperils the public safety. The right to impart instruction, harmless in itself or beneficial to those who receive it, is a substantial right of property—especially where services are rendered for compensation. But even if such right be not strictly a property right, it is, beyond question, part of one's [fundamental personal] liberty as guaranteed against hostile state action by the Constitution of the United States . . . The right to enjoy [i. e., exercise or practice] one's religious belief, unmolested by any human power, is no more sacred nor more fully or distinctly recognized than is the right to impart and receive instruction not harmful to the public. The denial of either right would be an infringement of the liberty inherent in the freedom secured by the fundamental law."

In this connection we call attention to the case of *State ex rel. Finger* v. *Weedman*, 55 S. Dak. 343, 226 N. W. 348, where the Court, in a case with identical principles involved here, among other things said:

"The primary purpose of each [constitution] is to insure religious freedom. Any act which interferes with such liberty is necessarily contrary to the spirit and purpose of the constitution, and therefore forbidden, whether expressly named therein or not, and, on the other hand, any act which does not so interfere is not unconstitutional unless expressly enumerated. . . .

"The persecution of our forefathers was merely one organization fighting another organization, and none of them fighting the living principles of the Bible, one trying to force on another its construction of the Bible and mode of worship. The primary object of the constitutions was to prevent that form of persecution.

"... History of the conflicts between Catholics and Protestants over those very differences refutes such conclusion. It makes no difference what our personal views may be as to the importance of the controversial words. As officers of the state, speaking for the state, neither we nor the teachers of the public schools can say that one side is right and the other wrong. We must leave that to the conscience of those involved.

"Parents with children of tender age may feel that it is their religious duty to give to the child proper religious instruction and to guard it from heresies. Consequently, if the state teaches religion, many parents will, because of their religious belief, keep their children from such teaching, and thereby be deprived of all public school privileges."

In 1 Corinthians 10:27-30 it is said, 'For why is my conscience judge of another man's conscience?'

See also *Kaplan* v. *Ind. School Dist.*, 214 N. W. 142.

The Supreme Court of Colorado, in *People ex rel. Vallmar* v. *Stanley et al.*, 81 Colo. 276, 282; 265 P. 610, held that a child of Catholic parents had the constitutional right to insist on being permitted to withdraw from the room while the ceremony of reading the *King James Version* of the Bible was conducted. The court held that such ceremony forced upon Catholics who believed in the authenticity only of the *Douay Version* was an infringement of the constitutional rights of the parents and children. There the court said:

"The parent has a constitutional right to have his children educated in the public schools of the State, Colo. Const. Art. IX, Sec. 2. He also has a constitutional right, as we have shown, to direct, within limits, his children's studies."

The Colorado Court of Appeals in *Florman* v. *School District No. 11*, 6 Colo. A. 319, 322; 40 P. 469, said:

> "The education of the children of the state is a duty which devolves upon state government."

In *Hardwicke* v. *Board of School Trustees*, 54 Cal. A. 696, 205 P. 49, the parents entertained conscientious objections to their children being required to take dancing lessons in school. Instead of telling them they could educate their children elsewhere, the court sustained their objections and upheld the right of the pupils to attend school without participation in the exercises.

In *Spiller* v. *Woburn*, 12 Allen (Mass.) 127, the school committee of Woburn had made an order requiring the reading of the Bible and prayer at the opening of school during which each pupil should stand with head bowed. The court held that any pupil did not need to join in the ceremony and could avoid any act of reverence, even to bowing the head, if the parents requested it. The court said:

> "Having in view the manifest spirit and intention of these provisions, an order or regulation by a school committee which would require a pupil to join in a religious rite or ceremony contrary to his or her religious opinions, or those of a parent . . . would be clearly unreasonable and invalid."

Children of parents having conscientious objections to the ceremony have been held to possess the constitutional right to direct the school authorities to excuse their children from the Bible reading ceremonies in other states. See *State* v. *Schieve*, 91 N. W. 846 (Nebraska); *Weiss* v. *School District*, 76 Wisc. 177; *People* v. *Board of Education*, 245 Ill. 334, 92 N. E. 251; *Herold* v. *Parish Board*, 136 La. 1034, 68 So. 16.

The constitutional right of parents not to have certain

subjects taught to their children in the public schools has been sustained. *Rulison* v. *Post*, 79 Ill. 303 (Bookkeeping); *Trustee* v. *People*, 87 Ill. 303, 29 Am. Rep. 55 (Grammar); *State ex rel. Kelley* v. *Ferguson*, 95 Neb. 63, 144 N. W. 1039 (Domestic Science); *State* v. *Mizner*, 50 Iowa 145 (Algebra); *Morrow* v. *Wood*, 35 Wisc. 59 (Geography).

In *Pierce* v. *Society of Sisters*, 368 U. S. 510, 534-535, an injunction was granted restraining enforcement of a state statute which required all children to attend the public schools. That Oregon law was held unconstitutional. The Court said:

> "Under the doctrine of Meyer v. Nebraska, 262 U.S. 390, we think it entirely plain that the Act of 1922 unreasonably interferes with the liberty of the parents and guardians to direct the upbringing and education of children under their control. As often heretofore pointed out, rights guaranteed by the Constitution may not be abridged by legislation which has no reasonable relation to some purpose within the competency of the State. The fundamental theory of liberty upon which all governments in this Union repose excludes any general power of the State to standardize its children. . . . the child is not the mere creature of the State; those who nuture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations."

It is submitted that if the state does not have the authority to compel a child to attend a public school to the exclusion of private schools, then the state does not have authority to compel a child to perform a public cerémony involving the *national* flag contrary to his private conscientious belief.

In *Meyer* v. *Nebraska*, 262 U.S. 390, this Court held that a statute providing for punishment of one who taught the German language in the public schools was an

unconstitutional violation of the freedom of speech, saying:

> "While this Court has not attempted to define with exactness the liberty thus guaranteed, the term has received much consideration and some of the included things have been definitely stated. Without doubt, it denotes not merely freedom from bodily restraint but also the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, establish a home and bring up children, to worship God according to the dictates of his own conscience, and generally to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men. . . . [citing many authorities].
>
> " . . . The established doctrine is that this liberty may not be interfered with, under the guise of protecting the public interest, by legislative action which is arbitrary or without reasonable relation to some purpose within the competency of the State to effect. Determination by the legislature of what constitutes proper exercise of police power is not final or conclusive but is subject to supervision by the courts. Lawton v. Steele, 152 U. S. 133, 137."

See, also, *Missouri ex rel. Gaines* v. *Canada*, 305 U. S. 337; *Farrington* v. *Tokushige*, 273 U. S. 284.

F

The advantages supposed to flow from the compulsory flag-salute regulation to the interests of the State are not sufficient to justify the denying of education to children who refuse to salute the flag for conscience' sake, and the conflict between the two interests presumes the regulation to be unconstitutional. [5]

When legislation undertakes to restrict or override conscientious beliefs it runs head on against a great affirmative principle expressly declared by the First Amendment and embodied in national emotions since the landing of the Pilgrims. So strong is the policy of safeguarding the basic individual liberties—including religious freedom—that the presumption should be against, rather than for, the validity of any statute abridging those liberties. Therefore, we submit that it would not be sufficient for the Court here to accept the mere opinion of other men. We respectfully submit that in a case of this kind the Court should *itself* be convinced of the existence of a public need which is sufficiently urgent to override the great principle of religious freedom and freedom to worship Almighty God in this particular case.

Furthermore, the position of appellants here is opposed by the statements of authorities on educational psychology which are noticed in the opinion of the United States Third Circuit Court of Appeals in the *Gobitis* case, 108 F. 2d 683. These statements are to the effect that the compulsory flag salute not only is ineffectual to accomplish the purpose of inculcating patriotism, but may indeed tend to dull patriotic sentiment.

We emphasize that the alleged public need in this case does not admit of proof like ordinary issues of fact or even the special issues of fact involved in the usual *due process*

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[5] The greater part of the argument on this proposition is taken from the brief of the Committee on Bill of Rights of the American Bar Association, filed in the *Gobitis* case.

cases. No eye-witnesses can say whether a child's morale and loyalty are actually increased after a compulsory salute opposed to his conscientious beliefs. The Court cannot depend on experts, because there are no experts. Opinions can be expressed one way or another about the effect of compulsory salutes, but these are based almost wholly in mere speculation. There are no considered researches. Nobody has made a psychoanalytical *investigation of the mental* reactions of children after a repugnant salute.

We submit that this is not a general law, such as is ordinarily enacted under the police power of the state to prohibit crimes, but is a special enactment that requires the expression of doubtful patriotic sentiment. The problems involved in determining whether a particular law is within the police power of the state are well summarized in Freund's work, *The Police Power*, page 133, Section 143, where he states:

> "The questions which present themselves in the examination of a safety or health measure are: does a danger exist? is it of sufficient magnitude? does it concern the public? does the proposed measure tend to remove it? is the restraint or requirement in proportion to the danger? is it possible to secure the object sought without impairing essential rights and principles? does the choice of a particular measure show that some other interest than safety or health was the actual motive of legislation?"

See, also, Freund, *The Police Power*, page 497, holding that if there is no reasonable connection shown between the means employed and the end reached, there is a duty to declare the statute unconstitutional when construed and applied to matters protected by the Constitution.

We do not understand it to be contended that the flag-salute ceremony has any practical consequences to popular

welfare or to the strength and resources of the government apart from the sentiments of loyalty which it is expected to arouse in the pupil's mind.

The above consideration may oblige the supporters of the compulsory flag salute to grant that coercion of children who refuse to comply with the salute upon "religious" grounds cannot induce loyalty *in them.* But they may suggest that the necessities of discipline require universal enforcement even if this means driving the children out of school. Such a position is, of course, familiar in military life. There coercion is often reasonable and necessary, since the very function of a military unit requires implicit and uniform obedience; and to obtain this, all non-compliance with orders, reasonable or unreasonable, must be firmly dealt with in furtherance of the very purpose for which the unit exists. The fallacy of attempting to apply this analogy to school life lies in the difference between the purposes of school education and the purposes of an army. The function of an army is to fight, and for that very reason to achieve a disciplined and regimented organization. But the purpose of *American* schools is primarily to impart knowledge and to prepare for life under free institutions. The purpose is *not* to turn out a regimented group seasoned to coercive methods.

When an examination is made of the other situations where it has been declared that religious liberty must give way to a legal requirement, the public need for such a requirement is obvious to sensible men and very different from the vague conception of *morale* involved in the case at bar.

But the object of the present law is admittedly not to obtain definite useful services, but merely to produce a state of mind. An increase of loyalty is proposed to be caused in the child by requiring conduct which offends his spiritual convictions. The possibility of such a result is so contrary to human experience and so completely unsupported by evidence, that the case at bar is clearly differen-

tiated from the military service and other cases, such as *Hamilton* v. *Regents*, 293 U. S. 245, 262, and *United States* v. *Macintosh*, 283 U. S. 605.

In the case of *Schneider* v. *State*, 308 U. S. 147, 162-164, this Court held that matters of public convenience did not justify exercise of the police power so as to invade the realm of freedom of speech and of press. In other words, the Court held that where fundamental personal liberties are involved, the state is restricted in its choice of methods of regulation and may not, in attempted enforcement of such regulations, restrict or abridge freedom of press, speech or worship where the ends sought are remote.

Nor is this rule restricted to freedom of press and freedom of speech but it also extends to the right of freedom of "religion". In *Cantwell* v. *Connecticut*, 310 U. S. 296, this Court well said:

> "Equally obvious is it that a state may not unduly suppress free communication of views, religious or other, under the guise of conserving desirable conditions."

We do not question the right of the public schools to conduct regularly the flag-salute ceremony; but we do question the attempt to compel conscientious objectors guided by the Word of God to salute the flag or participate in the ceremony to specific commandment of Jehovah God. It is perfectly proper and lawful for one *not bound* by a covenant with Jehovah to salute the flag of the United States when that person desires to salute it. It is entirely wrong to interfere with that right or prevent such one from saluting the flag. Conversely, it is also true that it is wrong and illegal to *compel* one who, for conscience' sake, cannot participate in the ceremony.

When the conflict arises and the school enters upon the effort to compel the pupil then an entirely different problem is presented. Then the *compulsory* flag-salute regulation

must be weighed and appraised against the constitutional right of the pupil and his parents. If the means employed, that is, the *compulsory* flag salute, has no reasonable and direct connection with the ends aimed at, it is the duty of the Court to declare the statute and regulation unconstitutional when brought into collision with provisions of the First Amendment. See Freund, *The Police Power*, pp. 133, 497.

It is suggested that if education is to be denied to children *who are disloyal* to the American government, then a more certain and accurate method is essential to determine whether or not the child is loyal. The flag-salute ceremony is inadequate for such purpose. Since it is only an outward display of loyalty it can be performed by persons who do not *think* of, comprehend or understand[6] its significance or meaning; and, indeed, the ceremony could be participated in by one who is exceedingly *disloyal* to the government, the Constitution and the things for which the flag stands in order to avoid detection and give a hypocritical outward appearance of loyalty and patriotism.

The contention here raised is disposed of favorably to the appellees in the words of Chief Justice Hughes (dissenting with concurrence of Justices Holmes, Brandeis and Stone) in *United States* v. *Macintosh*, 283 U. S. 605, 634:

> "There is abundant room for enforcing the requisite authority of law as it is enacted and requires obedience, and for maintaining the conception of the supremacy of law as essential to orderly government, without demanding that either citizens or applicants for citizenship shall assume by oath an obligation to regard allegiance to God as subordinate to allegiance to civil power. The attempt to exact such a promise, and thus to bind one's conscience by the taking of oaths or the submission to tests, has been the cause of many deplorable conflicts."

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[6] See APPENDIX A, page 91, infra, this brief.

Saluting the flag at most has only indirect possible effect upon the interests which can be protected by the state. It is manifestly foolish legislation when compared with the more urgent and needed legislation passed by Congress of the United States known as the "Selective Training and Service Act". It is noticed that the Congress of 1940 saw fit to accommodate the conscience of individuals by volunteering, contributing and providing exemption from military service for persons opposed thereto on reasonable grounds. If this does not endanger the safety of the nation, why cannot this Court enforce the exemption provided in the Bill of Rights to accommodate little children who conscientiously object to participating in the flag-salute ceremony?

G

The doctrine of supremacy of legislative declarations of policy of the state concerning general property rights claimed under the "due process" clause of the Fourteenth Amendment does not prevail where the legislative enactment is claimed to abridge the "civil rights" guaranteed by the First Amendment to the Constitution.

The declared guaranties of freedom of conscience, of worship, of speech and of press are statements by the people of this nation speaking directly to those who govern, and fixing the limitation of state and national governments and their subdivisions and subordinates, including school boards, when there is a conflict. Those express guaranties cannot be made to yield to the weaker, and at most indirect and oftentimes unauthorized, expression of the people through the legislature or school boards.

While it may be argued that the general rights of property protected and secured under the 14th Amendment to the Constitution may be required to yield to more specific statements of the legislature acting in a field of proper power, it cannot be said that any such requirement exists

with respect to the civil rights of personal liberty specifically guaranteed against all sorts of abridgments expressed in the 1st Amendment. When there is a collision between the stronger and express provisions of the first amendment with the stated policy of the legislature the decree of the legislature must yield unless such law or statute deals with an abuse of the rights guaranteed under the 1st amendment which is properly within the police power. It is admitted that the statutes drawn in question do not deal with an abuse of those rights. Before there can be an encroachment of these rights by laws enacted under the police power there must appear a clear and present danger that some interest which the state is authorized to protect from such abuse is immediately to be invaded. There is no such situation presented here.

The holding in the *Gobitis* case conflicts directly with the prior decision of this Court in *United States* v. *Carolene Products Co.*, 304 U. S. 144, 152, where it is said:

> "There may be narrower scope for operation of the presumption of constitutionality when legislation appears on its face to be within a specific prohibition of the Constitution, such as those of the first ten amendments, which are deemed equally specific when held to be embraced within the Fourteenth. See Stromberg v. California, 283 U. S. 359, 369-370; Lovell v. Griffin, 303 U. S. 444, 452.
>
> "It is unnecessary to . . . enquire . . . whether prejudice against discrete and insular minorities may be special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry."

The words of Mr. Justice Roberts in *Schneider* v. *State*, 308 U. S. 147, are appropriate on the issues here presented, to wit:

> "Mere legislative preferences or beliefs respecting matters of public convenience may well support regulation directed at other personal activities, but be insufficient to justify such as diminishes the exercise of rights so vital to the maintenance of democratic institutions."

In the *Gobitis* case it is said that the judgment of the legislature authorizing action of the school boards in promulgating the flag-salute regulation could not be inquired into or questioned *by the courts*. The Court does not discuss the limits of the police power of the state, does not discuss the circumstances when freedom of worship and conscience can be invaded, and does not employ the "clear and present danger" test, which is necessary. Though the legislature may decide in the first place what is necessary its decision is not final when liberty of conscience, of worship of Almighty God, of speech and of the person is denied. In the end this Court must decide whether there is justification for the abridgment and whether there is a *clear and present danger* which must be found to exist. The rule was well expressed in *Herndon* v. *Lowry*, 301 U. S. 242, when this court said:

> "The power of a state to abridge freedom of *worship, conscience*, speech and of assembly is the exception rather than the rule and the penalizing even of utterances of a defined character must find its justification in a reasonable apprehension of danger to organized government. The judgment of the legislature is not unfettered. The limitation upon individual liberty must have appropriate relation to the safety of the state. Legislation which goes beyond this need violates the principle of the Constitution." [Italicized words added.]

The doctrine of supremacy of the legislature has been

considered and condemned by one of the most eminent advocates and statesmen in history of these United States. Mr. Webster in the case of *Dartmouth College* v. *Woodward* (4 Wheat. 518, 581-582) said: "Every thing which may pass under the form of an enactment, is not, therefore, to be considered the law of the land. If this were so, acts of attainder, bills of pains and penalties, acts of confiscation, acts reversing judgments, and acts directly transferring one man's estate to another, legislative judgments, decrees, and forfeitures, in all possible forms, would be the law of the land. Such a strange construction would render constitutional provisions of the highest importance completely inoperative and void. It would tend directly to establish the union of all powers in the legislature. There would be no general permanent law for courts to administer, or for men to live under. The administration of justice would be an empty form, an idle ceremony. Judges would sit to execute legislative judgments and decrees, not to declare the law, or to administer the justice of the country." See *Webster's Works.*

This question has also been dealt with in *older days* by a well known New York judge in the case of *Taylor* v. *Porter,* 4 Hill (N. Y.) 140, 143, where it is said: "Statute law is in the highest sense the law of the land; and the legislative department, created for the very purpose of declaring from time to time what shall be the law, possesses ample powers to make, modify, and repeal, as public policy or the public need shall demand. Such being the case, the question presents itself whether anything may be made the law of the land, or may become due process of law, which the legislature under proper forms may see fit to enact? To solve this question we have only to consider for a moment the purpose of the clause under examination. That purpose, as is apparent, was individual protection by limitation upon power; and any construction which would leave with the legislature this unbridled authority, as has been well said by an eminent jurist, 'would render the restriction abso-

lately nugatory, and turn this part of the Constitution into mere nonsense.' The people would be made to say to the two Houses, You shall be vested with the legislative power of the State, but no one shall be disfranchised or deprived of the rights or privileges of a citizen unless you pass a statute for that purpose. In other words, you shall not do the wrong unless you choose to do it."

H

Although all effective means of inducing political change through "democratic processes" is left open by means of appeal to the forum of public opinion and legislative assemblies there is still not sufficient ground to relieve this Court of its responsibilities under the Constitution to determine the constitutional question presented.

The duties of this Court are well described by its former Chief Justice Marshall in the case of *Cohens* v. *Virginia* (1821), 6 Wheat. 264, 404, in these words:

> **"The judiciary cannot, as the legislature may, avoid a measure because it approaches the confines of the Constitution. We cannot pass it by because it is doubtful. With whatever doubts, with whatever difficulties, a case may be attended, we must decide it, if it be brought before us. We have no more right to decline the exercise of jurisdiction which is given than to usurp that which is not given. The one or the other would be treason to the Constitution. Questions may occur which we would gladly avoid, but we cannot avoid them. All we can do is to exercise our best judgment, and conscientiously perform our duty."**

This same attitude was well expressed by the Supreme Court of Colorado in *Walker* v. *Bedford*, 93 Colo. 400, 408, as follows:

"We pronounce as the most certain of law that there has never been, and can never be, an emergency confronting the state that will warrant the servants of the Constitution waiving so much as a word of its provisions. . . . No specie of reasoning, no ingenuity of construction, no degree of emergency, can persuade us that the Constitution is without potency or dissuade us from performing our duty as its sworn officers."

To the contrary of the above, however, Mr. Justice Frankfurter, in the *Gobitis* case, supra, at page 598 says:

"It is not our province to choose among competing considerations in the subtle process of securing effective loyalty to the traditional ideals of democracy, while respecting at the same time individual idiosyncrasies among a people so diversified in racial origins and religious allegiances. So to hold would in effect make us the school board for the country. That authority has not been given to this Court, nor should we assume it."

In this connection the rule is announced by this Court in *Schneider* v. *State*, supra, in the following language:

"This court has characterized the freedom of speech and that of the press as fundamental personal rights and liberties. The phrase is not an empty one and was not lightly used. It reflects the belief of the framers of the Constitution that exercise of the rights lies at the foundation of free government by free men. It stresses, as do many opinions of this court, the importance of preventing the restriction of enjoyment of these liberties.

"In every case, therefore, where legislative abridgment of the rights is asserted, THE COURTS SHOULD BE ASTUTE TO EXAMINE THE EF-

> FECT OF THE CHALLENGED LEGISLATION. . . . AND SO, AS CASES ARISE, THE DELICATE AND DIFFICULT TASK FALLS UPON THE COURTS to weigh the circumstances and to appraise the substantiality of the reasons advanced in support of the regulation of the free enjoyment of the rights." [Capitalization added]

The final duty falls upon the Supreme Court of the United States to settle the controversy brought before it, as in the *Gobitis* case; and it was entirely improper and contrary to the settled weight of authority to shift responsibility back to the school boards and the legislature, because *this Court is the last bulwark of liberty in this country.* In effect the *Gobitis* decision left the "poor and weak" and helpless minority known as Jehovah's witnesses at the mercy of public opinion and in the same manner as did Pontius Pilate when confronted with the responsibility of deciding what should be done concerning Jesus of Nazareth when before him *falsely* charged with the crime of sedition.

One of many basic fallacies of the *Gobitis* decision is that the Court entirely overlooked the fact that the statutes and regulation, though valid on their face, are unconstitutional as *construed and applied.* Mr. Justice Frankfurter assumes that if the statute is valid on its face, it is beyond the power of the Court to weigh the facts and circumstances to determine whether or not fundamental personal rights have been denied. This is contrary to decisions of this Court holding that validity of the statute depends on how it is *construed and applied.* In *Concordia Fire Ins. Co.* v. *Illinois,* 292 U.S. 535, 545, this Court said:

> "Whether a statute is valid or invalid under the equal protection clause of the Fourteenth Amendment often depends on how the statute is construed and applied. It may be valid when given a particular application and invalid when given another."

Likewise, this Court, in *Yick Wo* v. *Hopkins*, 118 U. S. 356, 373-374, added:

> "Though the law itself be fair on its face and impartial in appearance, yet, if it is applied and administered by public authority with an evil eye and an unequal hand so as practically to make unjust and illegal discriminations between persons in similar circumstances, material to their rights, the denial of equal justice is still within the prohibition of the Constitution."

In the *Gobitis* decision this Court *abdicated its duties* with respect to protection of the sacred rights of conscience of the individual and shifted such responsibilities to the school board, permitting such board's decision to be supreme. In justification of that step this Court announced the *new rule* that the citizen, regardless of how unpopular, oppressed and persecuted, must trust in the *majority* popular will to correct "foolish legislation" which admittedly violates the constitutional liberties of the people declared in the Bill of Rights. Thus this Court held that its only duty is to keep open the process of correcting such legislation by appeal to the popular open forum, the legislature, etc. This Court said that were its decision on this question given *in favor* of Jehovah's witnesses that would make it the *school board* for the nation. In effect the Court held that safeguarding "freedom of conscience" is entirely a local problem with which this Court is not concerned.

The new theory of requiring appeal through democratic processes to the *people* (i.e., majority rule or mob rule), as the only way to correct "silly" legislation violating the Bill of Rights, is judicial repeal of the Constitution itself. This returns small minorities and ALL non-majority persons to the same condition they were in prior to the American Revolution. If the citizen's exercise of his fundamental

rights depends on popular will, approval or consent of the *majority*, then such rights will change with the whim of every majority in power and the Constitution be not worth the paper it is written on.

When this Court refused to make itself "the school board for the country" by protecting the constitutional rights of Jehovah's witnesses and thus shifted the great burden and responsibility to the school boards, Jehovah's witnesses went along with this decision at every school term following June 3, 1940. When wholesale expulsions began throughout the nation they immediately appealed and have since continued to appeal to the local school boards to have the "foolish legislation" provide an exemption for those who had conscientious objection to the flag salute. The answer to this plea in every one of thousands of cases was that the Supreme Court of the United States has ruled that Jehovah's witnesses must salute the flag in order to enjoy the benefit of education. This nation-wide fight by Jehovah's witnesses during the last two and a half years in the "forum of public opinion" has not resulted in "abandonment of foolish legislation", has not been "a training in liberty" and has not served "to vindicate the self-confidence of a free people", but has unquestionably resulted in the very antithesis of these desirable ends.

It is a well known fact that minorities, especially when unpopular, have just about as little chance for repeal of *silly legislation* before the open forum of public opinion and some legislative bodies as a refrigerator salesman has to find buyers of his ice boxes in the land of the Eskimo. To offer minorities this sort of protection is like handing a straw to a drowning man to rescue himself!

The error of the suggestion to appeal to the *popular forum* is proved by the fact that thousands upon thousands of Jehovah's witnesses have been refused a fair hearing on their petitions to have the regulation amended so as to permit their children to attend school and be excused from

ceremonies of this character. All of said petitions have been denied annually under the "authority" of the *Gobitis* decision, since which case children have been denied education and parents their constitutional rights in all 48 states of the Union.

As a further illustration of how ineffective the suggestion of appeal by minorities to *popular rule* for relief, attention is called to the Negro situation in the South under the Jim Crow law and other customs prevailing there. In such situations, as above, where prejudice against small minorities prevents appeal to political processes to correct the evil, the minorities are thus left to the arbitrary will of the majority. This Court in such circumstances as these has the duty to scrutinize legislation which violates the rights of conscience regardless of whether or not the Court will become the *school board* for the nation. It is suggested that Jehovah's witnesses' experience with the school boards of the nation prove that such boards need a short lesson in democracy and "training in liberty" by being ordered to reinstate children of Jehovah's witnesses. Such would teach such stiff boards how to desist from searing the young conscience by applying the "hot poker" of oppression to innocent, liberty-loving little children who have sincere and valid objections to the compulsory flag salute.

It is respectfully urged that the decision in the *Gobitis* case made the school boards the *Supreme Court* of the nation as far as the compulsory flag-salute controversy is concerned. The net result is that the Court has allowed every individual principal, teacher, and school board member having anything to do with the controversy to become a little czar unto himself, and in every case to decide what seems right in the particular circumstances. In thus leaving this important national problem up to the school boards, to determine locally the question of freedom of conscience, chaos and confusion have resulted. Such a rule allows national disunity and works to the destruction of cohesion

because it permits each school district to establish a different rule which can easily change and vary with the rising of every sun. This rule announced in the *Gobitis* decision thus subordinates the Constitution to the rules of the school boards. Such nullifies the Constitution.

I

Freedom of speech is impaired and abridged by the compulsory flag-salute ceremony when children are expelled from school for refusal to salute the flag.

The requirement by law of the compulsory flag salute, contrary to the conscience of the individual, is similar, if not identical, to the ancient *test oaths* required as condition precedent to enjoyment of constitutional rights. In *Ex parte Garland*, 4 Wall. 333, 377 (1867), it was held that the requirement of special test oath as condition precedent to an attorney being admitted to practice law or to the bar of the local Federal court, was unconstitutional. Similarly, the compelling of the salute of the flag as a condition precedent to enjoyment of facilities of free public schools was held to be unconstitutional in the States of Kansas and Washington. (*State* v. *Smith and Griggsby*, supra; *Bolling* v. *Superior Court*, supra) See, also, *Cummings* v. *Missouri*, 4 Wall. 277, 323 (1867); *Kennedy* v. *Moscow*, 39 F. Supp. 26 (1941), and *Reid* v. *Brookville*, 39 F. Supp. 30 (1941), in which two last named cases the requirement that one salute the American flag and give the pledge of allegiance as conditions precedent to exercise of constitutional rights of freedom of the press was declared to be unconstitutional and void. In the *Reid* v. *Brookville* case, supra, an ordinance of the Pennsylvania city of Monessen was involved; in the other case, an ordinance of the City of Moscow, Idaho. See, also, special concurring opinion of Judge Chapman in the Supreme Court of Florida, in *State ex rel. Wilson and Shadman* v. *Russell*, 146 Fla. 539, 1 So. 2d 569.

Stromberg v. *California*, 283 U.S. 359, is also in point here. Yetta Stromberg, an American-born girl of Russian parentage, a supervisor of a summer camp in the foothills of the San Bernardino Mountains for children between ten and fifteen years old, was nineteen and a member of the Young Communist League, which was affiliated with the Communist Party. She led the children in their daily study of history and economics, stressing class consciousness and the doctrine that "the workers of the world are of one blood and brothers all." The camp library contained a number of books and pamphlets, many of them hers; and quotations from these by the state court in affirming her conviction abundantly demonstrated that they contained incitements to violence and to "armed uprisings," teaching "the indispensability of a desperate, bloody, destructive war as the immediate task of the coming action". It was agreed, however, that none of these books or pamphlets were used in the teaching at the camp. She testified that nothing in the library, and particularly none of the exhibits containing radical Communist propaganda, was in any way brought to the attention of any child or any other person, and that no word of violence or anarchism or sedition was employed in her teaching of the children. There was no evidence to the contrary.

The only charge against Yetta Stromberg concerned a ceremony which began every camp day. Under her direction a red flag was run up bearing a hammer and sickle—a camp-made reproduction of the flag of Soviet Russia and the Communist Party in this country. During this daily flag-raising, the children stood at salute by their cots and recited in unison: "I pledge allegiance to the workers' red flag and to the cause for which it stands, one aim throughout our lives, freedom for the working class."

She was arrested under a statute, California Penal Code, Section 403a, which prohibited and made a felony the display of a red flag in a public assembly "as a sign, symbol

or emblem of opposition to organized government, or as an invitation or stimulus to anarchistic action, or as an aid to propaganda that is of a seditious character."

. There is no distinction, we submit, between the *Stromberg* case, supra, and the case at bar. When the right of *free speech* is exercised the person says something, or performs an act, a gesture symbolic of speech, to communicate to others an idea. Such act or oral utterance used to communicate such idea may be violative of a statute, as was claimed in the *Stromberg* case, supra. Or, as in the case at bar, the person's electing to *withhold* a gesture (or oral utterance) by means of which a certain state of mind is openly manifested or declared to others, may be claimed to be violative of a statute or school-board regulation. In the case here, appellees are compelled, under threat of severe penalty, to cause their children to communicate or "say" something which the children's and the parents' sincere and conscientious understanding of the CREATOR'S written Law convinces them to be morally wrong *for them* to "say", and the saying of which *by them* in the manner required by the Regulation would result in their "eternal destruction" at the hand of their Maker, JEHOVAH GOD.

As in the *Stromberg* case, supra, the prohibition of the showing of a red flag "as a sign, symbol or emblem of opposition to organized government," could be held "an unwarranted limitation of the right of free speech", so here the compelled flag salute is equally an interference with the right of free speech. Compelling one to communicate by means of oral utterance or by gesture, under penalty, is quite as clear an invasion of the right of free speech as the attempt by law to *prevent* expression or communication by word or sign, such as use of the "red flag" in the *Stromberg* case, supra. Refusal of appellees' children to salute a flag does not present a *clear and present* danger of the character equal to that which the State claimed to be seeking to avert in the *Stromberg* case. There the court held

that the persistent practice of saluting the Communist emblem could not be prohibited by statute. If the right is given or safeguarded by the Constitution to salute the flag of a foreign power whose principles are at enmity to the principles of the United States Constitution, then with greater force of reason the Constitution of the United States shields the poor and helpless child who, bearing no allegiance to a foreign power, refuses for conscience' sake to salute the national flag.

The case of *Herndon* v. *Lowry*, 301 U. S. 242, is also in point. There a conviction of one who advocated overthrow of the government under an "insurrection statute" was set aside on the ground that it abridged his right of freedom of speech. This Court's holding in that case was referred to by Judge Parker of the court below (R. 52) thus:

> "Religious freedom is no less sacred or important to the future of the Republic than freedom of speech; and if speech tending to the overthrow of the government but not constituting a clear and present danger may not be forbidden because of the guaranty of free speech, it is difficult to see how it can be held that conscientious scruples against giving a flag salute must give way to an educational policy having only indirect relation, at most, to the public safety. Surely, it cannot be that the nation is endangered more by the refusal of school children, for religious reasons, to salute the flag than by the advocacy on the part of grown men of doctrines which tend towards the overthrow of the government."

Appellants claim that the purpose of saluting the flag is to 'instill in the children patriotism and love of country'. But why limit that compulsory rule to teachers and pupils of the public schools? Why not require that same ceremony in *all* the schools? Why not apply the same rule to all officials

of the Nation and State, from the President and the members of Congress down to the very least and humblest citizen? The general answer would be that *the enforcement of such a rule is ridiculous and nonsensical.* The opinion of the United States Circuit Court of Appeals (*Gobitis* case, supra) quotes appropriately the following:

> "Another form that false patriotism frequently takes is so-called 'Flag-worship'—blind and excessive adulation of the Flag as an emblem or image,—superpunctiliousness and meticulosity in displaying and saluting the Flag—without intelligent and sincere understanding and appreciation of the ideals and institutions it symbolizes. This, of course, is but a form of idolatry—a sort of 'glorified idolatry', so to speak. When patriotism assumes this form it is nonsensical and makes the 'patriot' ridiculous. (Moss, *The Flag of the United States, Its History and Symbolism*, Chap. 14, pp. 85-86.)"

We have, of course, no quarrel with broad statements like the foregoing insofar as they are aimed to emphasize that maintenance of loyalty and preservation of morals are of highest importance to the public welfare. No one disputes that. We submit, however, that such a premise falls far short of supporting the conclusion that some courts have sought to draw from it: that government can accomplish this proper purpose by *forcing* citizens, under severe penalty and against their will and conscience, to salute a particular symbol in a particular way. The crux of the whole matter relates to method. If it be constitutional to prescribe a salute and pledge to the national flag on the part of school children and to *force* compliance upon the ground that to do so may promote loyalty, then why, it may be fairly asked, could not the legislature choose to require a tribute of respect to some other symbol? In many countries, a person rather than a flag is considered the most appropriate

symbol of national unity and morale—usually the chief-of-state. In Germany, it is the Fuehrer rather than the swastika or the German flag that is the usual object of a gesture of loyalty; in Italy it is the same with the Duce, and in Russia, with Stalin. Would it, upon the reasoning just referred to, be constitutional to require school children to salute a portrait of a national hero—Washington, Lincoln or Jefferson—even if objecting children did not put their refusal upon religious grounds? Under like circumstances, would it be constitutional to require such a salute to a picture of the President during his term, whoever he might be?

It may be said that a portrait of a man differs from the flag in that the flag is merely an abstract symbol. Whether such a distinction is valid may be tested by inquiring whether it would be constitutional for the legislature to require *all persons, young* and old (except infants, the infirm and the sick), to salute the flag at stated intervals.

Specifically, let us suppose that a statute of West Virginia should require the whole adult population to give this particular form of salute once a week at a time to be fixed by the Governor or other executive agency. Let us suppose that many citizens refused to comply, but none on religious grounds. Some would presumably refuse on grounds of mere inconvenience; others might object to the particular form of the salute as too much resembling the Nazi or Fascist salutes. Still others would doubtless invoke their "liberty" as American citizens without further specifying what they had in mind. Let us suppose that these objectors were arrested and put on trial as to whether they should suffer penalties for their non-compliance and that they were to plead the unconstitutionality of the legislation as depriving them of their "liberty" under the Fourteenth Amendment. Would this plea be good?

We submit that the plea would be good and that such legislation would be unconstitutional. The requirement of such

a ritual is clearly alien to American institutions. It would be an intolerable invasion of individual liberties. Because it is inherent in the very nature of Americans to resent unnecessary assertions of authority, such a measure would not further the end of promoting loyalty and strengthening morale, but would have precisely the opposite effect.

The number of ways available for the promotion of loyalty, without resort to compulsory ritual, is indefinitely large. See address of United States Supreme Court Justice Jackson before the Texas Bar Association at San Antonio, as reported in the New York *Times* July 4, 1942, and in the *Texas Bar Journal* August 1942, Vol. 5, No. 8, pp. 255, 256.[7]

In *Thornhill* v. *Alabama*, 310 U. S. 88, 95, 102, in 1940, Mr. Justice Murphy, speaking for the Court, concerning the application of an Alabama statute, directed at labor agitation (as the Regulation here involved is directed at Jehovah's witnesses in providing "that refusal to salute the Flag be regarded as an act of insubordination"), said:

> "Those who won our independence had confidence in the power of free and fearless reasoning and communication of ideas to discover and spread political and economic truth. Noxious doctrines in those fields may be refuted and their evil averted by the courageous exercise of the right of free discussion. . . .
>
> "Freedom of discussion, if it would fulfill its historic function in this nation, must embrace all issues about which information is needed or appropriate to enable the members of society to cope with the exigencies of their period. In the circumstances of our times the dissemination of information concerning the facts of a labor dispute must be regarded as within that area of free discussion that is guaranteed by the Constitution."

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[7] See APPENDIX A, page 91, infra, this brief.

Free speech is essential to freedom of discussion. In this connection see consideration of this principle as related to the withholding and the giving of the required salute to the flag, appearing herein with regard to issues settled in *Stromberg* v. *California*, supra, pages 65-67.

J

Approximately three years' retrospect concerning the Gobitis case and events following said decision to date.[5]

Immediately following delivery of the *Gobitis* opinion on June 3, 1940, a nation-wide campaign of newspaper publicity and idle gossip was launched by enemies of Jehovah's witnesses, *falsely* accusing them of being 'against the flag and government', solely because they refuse to salute any flag, including the American flag, for *conscience'* sake. That opinion was like a lighted match applied to a field of dried grass. Prejudice created by unfavorable newspaper publicity flamed into open violence. Widespread mob attacks resulted immediately against Jehovah's witnesses. For more than two years, in thousands of communities throughout this land, certain religious elements or "would-be" patriotic elements have led men controlled neither by law nor reason to assault thousands of Jehovah's witnesses, men, women and children; destroyed their property; drove them from their homes; burned their houses, places of worship, furniture, books and money; tied groups of them together and forced castor oil in large quantity down their throats; herded them like beasts along hot, dusty roads and railroad rights-of-way in many places; dragged them along the main streets of the city by a rope around their necks and strung up; and committed numerous other deeds of

[5] A large portion of the information appearing under this proposition is taken verbatim from the article "Recent Limitations Upon Religious Liberty" (*American Political Science Review*, December, 1942) by Victor W. Rotnem, based on thousands of complaints and affidavits filed with the Federal Department of Justice, Civil Liberties Unit (headed by Mr. Rotnem).

violence and wickedness against them without a cause, and continue so to do to this day without interference from *the law*. Public officials, influenced by well-known religionists, broke into homes of private citizens, Jehovah's witnesses, kidnaped and carried them from one state to another, and broke up their private Bible-study assemblies.

Thousands of children have been expelled from school and great numbers prosecuted as delinquents, many convicted and ordered to be taken from parents. Hundreds of parents have been threatened with prosecution for the alleged crime of contributing to delinquency and truancy of their children and many convicted—all because they have taught them the Bible and the children have humbly obeyed God's commands.

Thus it is manifest that the *Gobitis* decision against *freedom of conscience* has ever been and now is an instrument for evil in the hands of superpatriots and pseudo-patriots.

Today hundreds of Jehovah's witnesses are being prosecuted under state laws enacted during March 1942 in Mississippi and in July 1942 in Louisiana, which prohibit possession and distribution of literature explaining the reasons why Jehovah's witnesses cannot salute a flag. The punishment in Mississippi is confinement in the penitentiary and is mandatory for the duration of the war, not to exceed ten years. In Mississippi many cases have been appealed to the state supreme court. Recently three of the several cases appealed have been decided adversely to Jehovah's witnesses sustaining the conviction and mandatory ten-year sentences. The cases are being appealed to this Court.

The State of Arkansas has followed suit by rushing through its legislature a statute like that of Mississippi, aimed directly at Jehovah's witnesses. This is another direct result of the *Gobitis* decision.

Between June 12 and June 20, 1940, hundreds of attacks upon Jehovah's witnesses were reported to the Federal

Department of Justice. Since 1940 many thousands of such cases have been reported to the department. Several of these cases were of such violence that it was deemed advisable to have the Federal Bureau of Investigation look into them. At Kennebunk, Maine, the Kingdom Hall of Jehovah's witnesses was destroyed by fire. At Litchfield, Illinois, practically an entire town mobbed a company of some sixty of Jehovah's witnesses who were peacefully going from house to house tendering to residents printed literature explaining the Bible, and it was necessary to call on the State Troopers to protect the victims of the mob numbering thousands. At Connersville, Indiana, several of Jehovah's witnesses were falsely charged with riotous conspiracy, their attorney and his wife were mobbed and brutally beaten and severely injured and driven out of town, as were also several other friends of the accused who attended the trial. At Jackson, Mississippi, members of a veterans' organization, led by an individual claiming the rank of major, forcibly removed a number of Jehovah's witnesses and their trailer homes from that city and state. These are but specimens of the thousands of other instances of violence equal or worse in scope. Three instances of such vigilantism led by state or municipal officers caused the Department of Justice to seek indictments against the officers for violation of the Civil Rights Act, Sec. 52, T. 18, U. S. C. According to reports from the department the respective grand juries refused to indict. Then an information was filed in the worst of those three assaults in which a chief of police and deputy sheriff had forced a group of Jehovah's witnesses to drink large doses of castor oil and had paraded the victims through the streets of Richwood, *West Virginia*, tied together with police department rope. The trial of this outrage resulted in a speedy conviction. Defendant Catlette, deputy sheriff aforesaid, appealed. The Circuit Court of Appeals for the Fourth Circuit affirmed. *Catlette* v. *United States* (January 6, 1943) .... F. 2d ....

A very few instances of violence have been the subject of other judicial review and opinion of the courts. However, a few instances have received attention: See *City of Gaffney* (S. C.) v. *Putnam*, 15 S. E. 2d 130; *Chaplinsky* v. *New Hampshire*, 315 U. S. 568; *Lynch* v. *City of Muskogee* (Okla.), 47 F. Supp. 589; *McKee* v. *State* (Okla. Criminal Court of Appeals, decided Dec. 9, 1942) 132 P. 2d 173. See Jurisdictional Statement in No. 566, October Term 1941, styled *Trent* v. *Hunt*, and Jurisdictional Statement in No. 567, October Term 1941, styled *Bevins* v. *Prindable*.

Here we invite the Court's attention to the statement of United States Solicitor General Francis Biddle, in his address of June 16, 1940, broadcast over a coast-to-coast network of the National Broadcasting Company, concerning mob violence practiced against Jehovah's witnesses:

> "*. . . Jehovah's witnesses have been repeatedly set upon and beaten. They had committed no crime; but the mob adjudged they had, and meted out mob punishment. The Attorney General has ordered an immediate investigation of these outrages.*
>
> "The people must be alert and watchful, and above all cool and sane. Since mob violence will make the government's task infinitely more difficult, it will not be tolerated. We shall not defeat the Nazi evil by emulating its methods."—Excerpt from mimeograph copy of address of Solicitor General Biddle furnished by him to appellees' counsel.[9]

[9] See also publications of the American Civil Liberties Union entitled "The Persecution of Jehovah's witnesses", published January 1941; booklet entitled "Liberty's National Emergency—The Story of Civil Liberty in The Crisis Year 1940-1941", published in June 1941; and "Jehovah's witnesses and the War", published in January 1943. See also "The Case of Jehovah's witnesses" (John Haynes Holmes), *The Christian Century* (Chicago) for July 17, 1940; "Armageddon, Inc." (Stanley High), *The Saturday Evening Post* (Philadelphia) for September 14, 1940; "Jehovah's witnesses, Who Refuse to Salute the Flag," *Life* magazine (Chicago) for August 12, 1940; "Fifth Column Jitters" (Charles R. Walker), *McCall's* magazine (New York) for November 1940; "Jehovah's 50,000 witnesses" (H. Rutledge Southworth), *The Nation* (New York) for August 10, 1940;

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Jehovah's witnesses assembled in national convention in July, 1940, such assembly being held simultaneously in twenty cities of some fifteen states, all convention halls being linked by telephone lines to the key assembly at Detroit, Michigan. At the urgent request of the Department of Justice, through the United States Attorneys, local law enforcement officers were induced to give those conventions adequate protection, so that no violence attended. In this connection, it should be noted also that persecution of Jehovah's witnesses is frequently a small-town and rural-community phenomenon, whereas their conventions are held in the larger cities of the country.

In September 1942, Jehovah's witnesses assembled in 52 cities in the United States, with Cleveland, Ohio, as the key assembly point and the other cities linked by telephone lines. In three of the cities *mobocracy* "took over" and the "four freedoms" were *blitzkrieged*. At Little Rock, Arkansas; Springfield, Illinois, and Klamath Falls, Oregon, demonized mobs overran these three cities unhindered by the duly elected officers of the municipalities; property was destroyed, cars and trucks overturned, telephone lines cut, assembly halls damaged, bonfires of Bible literature crackled and blazed in the streets; crowds of men, women and children assailed; children stoned, teeth knocked out, noses broken; Christian women foully cursed, brutally beaten and then robbed; Christian men feloniously assaulted, clubbed, slugged with blackjacks, knifed and shot; victims left bleeding, clothing of some completely torn off, others left lying

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"Peddlers of Paradise" (Jerome Beatty), *The American Magazine* for November 1940; "Rutherfordism v. Catholicism" (Thomas Emmett Coll), *Our Sunday Visitor* (Huntington, Indiana) for August 4, 1940; "A Current Problem in Freedom of Speech and of Religion" (Joseph T. Tinnelly), *St. John's Law Review* (New York) for November 1941, Vol. XVI, No. 1; "The Strange Jehovahs" (Edgar W. Waybright), *Liberty* (Washington, D.C.) for Second Quarter 1942, Vol. 37, Number 2; "I Admire the Jehovah witnesses" (John S. Kennedy), *Columbia* (New Haven, Conn., national organ of Knights of Columbus and world's largest Catholic magazine) for January 1943.

unconscious in bloodsoaked remnants of their apparel; bruised and beaten bodies cast off the road to lie for hours unattended and indeed left for dead—all without so much as a "so sorry". And this was provoked because of misrepresentation of Jehovah's witnesses and because of their conscientious refusal, in obedience to God's Law (Exodus 20: 3-6) to salute any flag when commanded by the mobsters to do so. Not one of such criminal mobsters was arrested or prosecuted.

In the two years following the *Gobitis* decision, it can be authoritatively stated, the files of the Department of Justice reflect an uninterrupted record of similar violence and persecution of Jehovah's witnesses like above cases. Almost without exception, the flag and refusal to give the salute can be found as the percussion cap that set off these acts.

In Oklahoma, children of Jehovah's witnesses expelled from the Woods County Public Schools for refusal to salute the flag were being tutored by an ex-school teacher in her home. She now has been convicted of failing to require the flag salute in her private classes although she had formulated a different exercise, consisting of a pledge of allegiance to Almighty God and expressing respect for the flag. Her case is pending on appeal with three similar cases against parents under same statute in the Oklahoma Criminal Court of Appeals: *Carter-Mort* v. *State*, *Pendley* v. *State*, *Zimmerman and McCurley* v. *State*, *Partain* v. *State*.

In many states in addition to Oklahoma and West Virginia, the flag has been used in a manner bordering on immorality by mobs which have therewith baited groups of Jehovah's witnesses. Mayors' courts and justices of the peace courts in nearly every state of the Union have entertained evidence relative to the refusal of Jehovah's witnesses to compromise their conscientious convictions about flag saluting as an excuse to convict them on charges of breach of the peace, inciting to riot, violating of peddling ordinances,

and other misdemeanors. Few such decisions, however, have been honored on appeal to courts of record, resultant expense of prosecuting which appeals, though exceedingly great in the aggregate, Jehovah's witnesses have borne out of their very limited resources.

This ugly picture of the years following the *Gobitis* decision is an eloquent argument in support of the minority contention of Mr. Justice Stone, and of the position taken in June 1942 by Justices Murphy, Douglas and Black that they "wrongly decided" the *Gobitis* case in 1940. The placing of symbolic exercises of comparatively insignificant constructive value on a higher plane than *freedom of conscience* has made this symbol an instrument of oppression of a God-fearing, law-abiding minority comprising courageous, home-loving, industrious, upright citizens. *The flag has been besmirched and degraded by its misuse* to deny the very freedoms it is intended to represent, the freedoms which themselves best engender a healthy "cohesive" respect for national institutions. In short, public health, safety, morals and welfare have NOT been fortified by the compulsory flag-salute laws and regulations. Indeed, the unhappy result, nation-wide, has been quite the contrary.

The vigor of constitutional guarantees such as freedom of worship and freedom of speech, on which respect for flag and country must depend, flows from their ever-renewed public recognition and observance. How much more effective an instrument of patriotic education it would be if the flag-salute ceremony itself were made a practical daily lesson in a fundamental liberty—as judicially and judiciously suggested by the present Chief Judge of the highest court of New York State—a liberty which is one of the four great freedoms for which inhabitants of this land now fight!

In that case (*People* v. *Sandstrom*, 279 N. Y. 523, 18 N. E. 2d 840, Jan. 17, 1939) Judge Lehman said:

"An act of disrespect to the flag by child or parent

> may be punished, but there is no disrespect to the flag in refusal to salute the flag by a child who has been taught that it is a moral wrong to show respect in the form of a salute. . . . *The flag salute would lose no dignity or worth if she were permitted to refrain from joining in it. On the contrary, that would be an impressive lesson for her and the other children that the flag stands for absolute freedom of conscience* . . .
> [Italics added]
>
> "The salute of the flag is a gesture of love and respect—fine when there is real love and respect back of the gesture. The flag is dishonored by a salute by a child in reluctant and terrified obedience to a command of secular authority which clashes with the dictates of conscience. The flag 'cherished by all our hearts' should not be soiled by the tears of a little child. The Constitution does not permit, and the Legislature never intended, that the flag should be so soiled and dishonored."

To this same effect, see *In re Latrecchia*, 128 N. J. L. 472, 26 A. 2d 881, decided by the New Jersey Supreme Court June 30, 1942.

Out of all the resistance by Jehovah's witnesses to the flooding reign of terror has emerged a pile of immovable "stones" as a memorial, establishing confidence in the judicial system of America. In spite of the hope expressed by Justice Frankfurter about democratic processes and the forum of public opinion, it should be noted that the only relief given against this storm of violence and persecution of men, women and children because of conscience' sake, was by brave and noble judges who dared to face boldly the majority rule and expound the Constitution!

It is well to mention such gems of democracy for consideration here. The cases are directly in point here and prove the fallacy of the *Gobitis* decision.[10]

There are a number of other cases of lower trial courts which are unreported. In every instance the *Gobitis* case was not extended any further than to allow expulsion of children from school. Some courts defiantly refused to follow the *Gobitis* decision outright, using the State Constitution as a shield of protection of the cherished right against the *Gobitis* decision.

An examination of the various law review publications and legal periodicals of the various universities and associations establishes the fact that that section of the "public forum" disapproves the *Gobitis* decision. Their words establish the fact that such decision will not work in a democracy, that it is unsound and unconstitutional. A list of some of the periodicals is given herewith in footnote.[11]

In the forum of opinion the public press has been waging vigorous and continuous war on the majority opinion in the *Gobitis* case. Although the number protesting has been great, the legislative bodies and school boards have not yielded to the newspapers' influence upon such forum

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[10] *In re Jones*, 24 N. Y. S. 2d 10, 175 Misc. 451;
In re Reed, 28 N. Y. S. 2d 92, 262 A. D. 814;
In re Lefebvre ..... N. H. ....., 20 A. 2d 185;
In re Latrecchia, 128 N. J. L. 472, 26 A. 2d 881;
State v. Smith and Griggsby, 155 Kans. 588, 127 P. 2d 518;
People v. Chiafreddo, ... Ill. ....., 44 N. E. 2d 888;
Barnette v. W. Va. State Board of Education et al., 47 F. Supp. 251;
People v. Sandstrom, 279 N. Y. 523, 18 N. E. 2d 840;
Commonwealth v. Johnson et al., 308 Mass. 370, 35 N. E. 2d 801;
Bolling v. Superior Ct for Clallam County, ... Wash. ....., ... P. ....., decided Jan. 29, 1943 by Supreme Court of Washington.

[11] 1943: 29 Va. Law Rev., January, 440-459.
1942: Yale Law Journal, December; 17 Indiana Law Journal 555.
1941: 1 Bill of Rights Rev. 267; 1 Bill of Rights Rev. No. 1 (Supplement); 6 Missouri Law Rev. 106; Fennell, "The Reconstructed Court" and Religious Freedom; The Gobitis case in Retrospect (1941) 19 New York University Law Quarterly Rev.
1940: Balter, "Freedom of Religion Interpreted in Two Supreme Court Decisions", 15 California S. B. J. 161; 26 Cornell Law Quarterly 127; 29 Georgetown Law Journal 112; 9 Internat'l Jurid. Assn. Bulletin 1;

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by permitting the children to return to school. A list of some of the newspapers is given in another footnote.[12]

[NOTE 11 *continued from preceding page*]

39 Michigan Law Review 149; 18 New York University Law Quarterly Rev. 124; 15 St. John's Law Rev. 95; 14 So. Calif. L. Rev. 56, 57; 14 So. Calif. L. Rev. 73; 14 Univ. of Cincinnati L. Rev. 570; 4 Univ. of Detroit Law Journal 38; 15 Washington Law Rev. 265; Cushman, "Constitutional Law in 1939-1940", 35 Amer. Pol. Sci. Rev. 250, 269-271; Konoviz, "The Case of the Eight Divinity Students", 1 Bill of Rights Rev. 198, 204-205. See, also, *Consolation* (Brooklyn, N. Y.) July 24, 1940, pp. 7-8.

[12] Newspapers of the United States that have published editorials differing from the majority opinion of the United States Supreme Court number several hundred, of which a few are the following:

Asbury Park (N. J.) *Press;* Altoona (Pa.) *Mirror;* Arvin (Calif.) *Tiller;* Ann Arbor (Mich.) *News;* Arlington (Kans.) *Enterprise;* Auburn (N. Y.) *Citizen-Advertiser;* Akron (Ohio) *Beacon Journal;* *The American Freeman*, Girard, Kansas; *The American Guardian*, Oklahoma City, Okla.; *The American Protestant*, Washington, D. C.; Bridgeport (Conn.) *Post;* Boston (Mass.) *Post;* Boston (Mass.) *Herald;* Birmingham (Ala.) *Age-Herald* and *News;* Baltimore (Md.) *Sun;* Boston (Mass.) *Transcript;* Bayonne (N. J.) *Times;* Brockton (Mass.) *Enterprise;* Butte *Montana Standard;* Buffalo (N. Y.) *Times;* Bismarck (N. Dak.) *Tribune;* Benton Harbor (Mich.) *News-Palladium;* Sonora (Calif.) *Banner and News;* Buffalo (N. Y.) *Courier-Express;* Chicago (Ill.) *Tribune;* Chicago (Ill.) *News;* *Christian Century*, Chicago, Ill.; *The Covenant Weekly*, Chicago, Ill., Cincinnati (Ohio) *Enquirer;* Cincinnati (Ohio) *Post;* Columbus (Ohio) *Citizen;* Columbus (Ohio) *State Journal;* Camden (N. J.) *Courier-Post;* Cleveland (Ohio) *News;* Cleveland (Ohio) *Plaindealer;* Cleveland (Ohio) *Press;* *Svenska Amerikanaren Tribunen*, Chicago, Ill.

Dallas (Texas) *Dispatch-Journal;* *Daily News*, Wellington Kans.; Denver (Colo.) *Post;* Decatur (Ill.) *Herald;* Detroit (Mich.) *Times;* Duluth (Minn.) *Herald;* Des Moines (Iowa) *Register;* Dayton (Ohio) *News;* Detroit (Mich.) *Free Press;* *The Daily Republic*, Mitchell, S. Dak.; Easton (Pa.) *Herald;* Fort Myers (Fla.) *News-Press;* Fergus Falls (Minn.) *Journal;* Frederick (Okla.) *Press;* Fort Worth (Texas) *Star-Telegram;* Greenfield (Mass.) *Recorder-Gazette;* Greenfield (Mass.) *Shopping News;* Glens Falls (N. Y.) *Times;* Glenwood (Minn.) *Herald;* Great Falls (Mont.) *Tribune;* Hemet (Calif.) *News;* Hollywood (Calif.) *Citizen-News;* Hartford (Conn.) *Courant;* Johnstown (Pa.) *Democrat;* Johnstown (Pa.) *Daily Tribune;* Jacksonville (Fla.) *Journal;* Key West (Fla.) *Citizen;* Kansas City (Mo.) *Journal;* *Simpson's Leader-Times*, Kittanning, Pa.; Louisville (Ky.) *Times;* Louisville (Ky.) *Courier-Journal;* Los Angeles (Calif.) *Examiner;* Los Angeles (Calif.) *News;* *Press-Telegram*, Long Beach, Calif.

Miami (Fla.) *Herald;* Miami (Fla.) *News;* Milwaukee (Wis.) *Sentinel;* Minneapolis (Minn.) *Tribune;* Massillon (Ohio) *Independent;* *The Monitor*, Aurora, Mo., Mobile (Ala.) *Press;* Memphis (Tenn.) *Press-Scimitar;* Bartlesville (Okla.) *Morning-Examiner;* *News Bulletin*, National Education Association, Washington, D. C.; New York *Times;* New York *Herald Tribune;* New York *Daily News;* New York *Post;* New York *Sunday Mirror;* New York *World-Telegram;* *The Nation*, New York city; Newark (N. J.) *News;* Newark (N. J.) *Ledger;* North Adams (Mass.) *Transcript;* New Britain (Conn.) *Herald;* Nashville *Tennessean;* Oakland (Calif.) *Tribune;* Oroville (Calif.) *Mercury-Register.*

American Legion Brief Amicus Curiae

Filing here of a brief *amicus curiae* by The American Legion makes necessary a summary discussion of the horrifying and wholly needless assaults upon Jehovah's witnesses in the name of and by representatives of The American Legion. Although that organization's corporate charter [13] provides, among other things, that—

> "the purpose of this corporation shall be: To promote peace and good will among the peoples of the United States and all the nations of the earth;"

and the preamble to the Legion's Constitution provides that—

> "For God and country we associate ourselves together for the following purposes: To uphold and defend the Constitution of the United States of America; to maintain law and order; . . . to promote peace and goodwill on earth; to safeguard and transmit to posterity the principles of justice, freedom and democracy . . ."

—THE FACTS show that many misguided persons of no understanding or of conscienceless and unscrupulous ilk have shamelessly misused the power and influence of the offices of that corporation entrusted to them, to persecute Jehovah's witnesses. For example, on June 29, 1940, the preamble above mentioned was read by Legionnaires to Jehovah's witnesses who then were violently assaulted, large doses of castor oil forced down their throats and they tied along a large rope and thus driven through the streets of Richwood, West Virginia, because of their conscientious refusal to salute the flag. See *Catlette* v. *United States*, (.... F. 2d ...., CCA-4), decided January 6, 1943.

It was the commander of the Gibsonburg (Ohio) Legion Post who led a mob of 1,000 against a meeting place of

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[13] "An Act to incorporate the American Legion"—Public No. 47, 66th Congress, H. R. 6808; approved September 16, 1919.

Jehovah's witnesses on July 5, 1940, because of their refusal to salute the flag.

On June 19, 1940, at Rockville, Maryland, a Legionnaire, then chief of police of Rockville, and his men directed a mob attack upon the assembly place of Jehovah's witnesses, destroying much property and utterly wrecking the hall.

At Kingfisher, Oklahoma, the local Legion post publicly circulated a handbill accusing Jehovah's witnesses as being of the "fifth column", which purported to be on advice from state and national headquarters. Like advertisements, published in the name of the Legion, appeared frequently during 1940 in many other states.

In a news release published at Jackson, Mississippi, June 29, 1940, Dr. A. C. Bryan, local post commander acting in the name of The American Legion, launched his state-wide *round-up* of Jehovah's witnesses by announcing that 'they were undermining American patriotism' and declared it to be the public duty of every citizen to 'summon the police on sight of any witness'. Bryan further *falsely* published that 'their literature was printed in Germany, aimed at democracy and designed to destroy patriotism'.

In Texas the fires of violence against Jehovah's witnesses were fanned by numerous Legionnaires, including Mark McGee, Fort Worth attorney and former commander of the Fourth Division, Department of Texas, in his public address on June 30, 1940, advising the Legion's state convention that Jehovah's witnesses were "adverse to the ideals of Americanism".

In Illinois, on June 30, 1940, Major Bittinger encouraged violence (which swiftly followed in many Illinois communities) before the convention of the Legion's Illinois department by publicly stating that Jehovah's witnesses "are in the unpatriotic class".

Early in June 1940, by means of a special release sent to newspapers of the nation and all Legion posts, the national commander, Raymond J. Kelly, advocated "summary ac-

tion" against 'unpatriotic elements' and said "those who clamor the loudest about the dangers of losing such liberties bear the most watching". That special release consisted of "two advance reprint pages", in facsimile, of the June (1940) issue of *The National Legionnaire*, Vol. 6, No. 6, containing Kelly's article "The Legion Called the Turn". On June 10, 1940, on behalf of Jehovah's witnesses, J. F. Rutherford, then president of the Watchtower Society, wrote Commander Kelly. The letter speaks for itself. (APPENDIX B, p. 100, *infra*) *Only reply* received was nation-wide "summary action" by Legionnaires against Jehovah's witnesses, like that at Richwood, W. Va.—page 81, supra.

Similarly and simultaneousiy (June 13, 1940) the Legion's national director of its Americanism Commission, at the Roanoke (Va.) Auditorium, in a public address widely circulated by The Associated Press, falsely charged that Jehovah's witnesses preached under pretext of a religious organization that the flag should not be respected. Also for several years that same national director, Homer L. Chaillaux, has mailed to Legion posts and others throughout the nation from Legion's headquarters at Indianapolis hundreds, if not thousands, of letters falsely charging Jehovah's witnesses with preaching "doctrines of disloyalty".

These few of legion examples of what has comprised a continuous nation-wide campaign of hate, covertly waged by officers of the Legion against Jehovah's witnesses because of their worship of Almighty God and conscientious refusal to salute *any* flag, has induced many brutal and violent acts against thousands of harmless, God-fearing men, women and children. In the thousands of cases of mob assaults that have occurred during the past three years in every part of this country against Jehovah's witnesses, more than half can be authoritatively identified directly with representatives of the Legion as the proximate cause or as perpetrated under their actual and boasted leadership.

All this unlawful and illegal course of needless and unrestrained brutality irresistibly reminds one of the gigantic organization of so-called "bullies", *nephilim*, that 'filled the earth with violence' in the days of Noah. (Genesis 6: 4-7; Matthew 24:37-39) The modern-day counterpart of some Legionnaires who have usurped and abused power in this country are *Der Fuehrer's* "Storm Troopers" of Nazi Germany and *Il Duce's* "Black Shirts". Naively, the Legion's national commander (Alvin Owsley) in 1923 declared "that the Fascisti are to Italy what the American Legion is to the United States".[14]

These facts are mentioned to show that here The American Legion is not a non-partisan *amicus curiae*, but in this controversy has an active, un-American, self-serving and biased interest in opposing appellees on the pending legal issues. Therefore argument contained in its brief should be scrutinized, weighed and appraised with a knowledge of these interests, prejudices and historical facts.

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[14] See "The American Legion Takes Orders" (Mayer), *The American Mercury* (Oct. 1939) Vol. 48, No. 190.

TWO

The statutes and regulation in question, providing for compulsory flag-salute ceremony in public schools, when *construed and applied* to facts and circumstances of this case, deny appellees' right to have their children attend the free public schools by requiring the doing of an act contrary to the *due process* and *equal protection* clauses of the Fourteenth Amendment to the United States Constitution.

The right of minor children of appellees to an education in the free public schools of the state of West Virginia is a civil right.

In the instant case, because of the refusal of the children of Jehovah's witnesses and appellees to salute the flag, the school authorities made it impossible for them to attend public school without violating their conscientious convictions, as a result of which they may be subjected to prosecution for violating the compulsory education law. The compulsory flag-saluting requirement thus directly deprives appellees and their children of liberty and equal rights without due process.

The admitted facts establish the proposition that the appellee-parents are not able financially to send their children to private schools and that if the children receive any schooling at all it must be through the public schools, attendance at which is denied them under the statutes and regulation.

The compulsory flag-salute requirement deprives the parents-appellees of liberty to send their children to school without violating their conscientious convictions. The liberty of the parents to direct the education of their children has specifically been recognized by this Court, as pointed out in this brief, pages 43-48, supra.

The right of the parents to have their children receive an education in the free public schools of the state of West Virginia is a civil right, the exercise of which cannot be conditioned upon the doing of an unconstitutional act. See *Terral* v. *Burke Construction Co.*, 257 U. S. 529.

In *People* v. *Stanley*, 81 Colo. 276, 265 P. 610, it was said:

> "The parent has a constitutional right to have his children educated in the public schools of the State. He also has a constitutional right, as we have shown to direct within limits, his children's studies. The school board, though with full power to prescribe the studies, cannot make the surrender of the second a condition of enjoyment of the first. . . . This proposition has been more or less in doubt, but is finally settled in Terral v. Burke Construction Co., 257 U. S. 529."

For other authority that the State cannot thus accord a right or privilege upon condition that the recipient sacrifice a right guaranteed by the United States Constitution, see: *Frost* v. *Railroad Com'n of Calif.*, 271 U. S. 583; *Hanover Ins. Co.* v. *Harding*, 272 U. S. 494, 507. See *State* v. *Smith*, 155 Kans. 588, 127 P. 2d 518.

Indeed, were this otherwise, all the rights guaranteed by the United States Constitution could be taken away by the States by granting of States' rights or privileges conditioned upon the abandoning of Federal rights. To allow such a subterfuge to deny the appellee-parents and their children their constitutional rights is to violate both the spirit and letter of the Constitution.

Moreover, the regulation which is depriving the children of the right to attend the free public schools without violating their conscientious convictions works injury on the parents-appellees' (and others of Jehovah's witnesses') right to teach their children right principles in harmony with the commandments of Almighty God. One of the liberties guaranteed by the Fourteenth Amendment is that of the parents

to direct the education of their children. This liberty cannot be infringed by making the enjoyment of a civil right, i. e., the right to have their children attend the free public schools, conditioned upon an unconstitutional requirement. See *Pierce* v. *Soc. of Sisters,* supra; *Meyer* v. *Nebraska,* supra.

Unless the parents can afford to send their children to a private school, both the parents and their children will be forced either to forego the right of freedom of worship or to violate the compulsory education law of the state of West Virginia.

Appellees therefore submit that they are being unconstitutionally deprived not only of the right of their children to have and enjoy a free public school education by conditioning the enjoyment of this right on the compliance of said children with an unconstitutional requirement in deprivation of freedom of worship and conscience, but also the right to enjoy such freedom without being subject to prosecution for violation of the compulsory education law.

Conclusion

The compulsory flag salute is not one of the demands of *Caesar* which can be lawfully and reasonably required of Jehovah's witnesses. It does not come within the purview of the proper demands of *Caesar,* i.e., The State, to which the Christian in a covenant with Almighty God is counseled to render what is due. On the contrary the Bible record shows conclusively that Almighty God condemns unto everlasting death any one of His covenant-making servants who willingly submits to the worship of any such image.

The United States was founded as a haven and place of refuge for persons of all creeds to exercise their liberty of conscience without molestation. The Constitution gives the right to salute the flag to those who desire to salute it; it also guarantees the right of Jehovah's witnesses, who con-

scientiously object to saluting the flag, the right to refuse to salute it.

Although the flag-salute ceremony has existed in this country for many years it has never become compulsory until recent years. When the Nazis came to power and began their campaign of conquest, in the Third Reich, as well as in the conquered countries, they instituted the public ceremony of salute to the swastika as an indication of allegiance and loyalty to the Reich. All religions and persons complied except Jehovah's witnesses who have been beaten, killed and torn asunder in the Reich for approximately ten years. When the Japanese began their plans for world domination in collaboration with the Nazis they demanded that all churches and members of Catholic and Protestant denominations do obeisance regularly before church services by bowing to the Japanese flag, sing the Japanese anthem, repeat the oath of allegiance to Japan and give the bow to the East. There all persons and religions complied, including Protestant religionists and the Catholic Hierarchy, which latter now maintains an envoy in Japan. There Jehovah's witnesses alone refused to comply with such unreasonable and God-dishonoring demands and have been killed and persecuted brutally for more than seven years.[15]

The manifest *foolish legislation*, the *compulsory* flag salute, in the United States, is just a scheme of the pseudo-patriots to *"get"* Jehovah's witnesses. The record of God's servant Daniel, who in ancient time was an official of the Medo-Persian government, proves this. He was a man of integrity and honesty in all his dealings. His enemies conspired to "get" him. They wanted him out of the way. They

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[15] See *The Independent Board Bulletin*, October 1942, published by The Independent Board for Presbyterian Foreign Missions, 151 Maplewood Avenue, Germantown, Philadelphia, Pa.; *The Missionary Review of the World*, published monthly by Missionary Rev. Pub'g Co., Inc., 156 Fifth Avenue, New York City, issue of December 1938 and issue of February 1939, pp. 71-73.

knew they could not find anything against him as to his work or honesty in his service to the government. They are reported as saying: "We shall not find any occasion against this Daniel except we find it against him concerning the law of his God." (Daniel 6:5) They framed a law (Psalm 94:20) which was contrary to the Law of Almighty God and all persons were commanded to comply therewith. Daniel refused and was caught in the conspiracy trap. He was thrown to the lions, but God delivered him because of his faithfulness to His covenant.

The compulsory flag-salute regulation is being used as a part of the totalitarian conspiracy for world domination to "get" Jehovah's witnesses in the same manner as Daniel was *framed*, while the great mass of the people are otherwise being regimented. It is manifestly foolish and silly legislation. The approximately seven years of endurance of persecution in the United States because of the regulation, and more than ten years' endurance of suffering for refusal to *heil Hitler* and his satellites and their respective "flags" in the *axis* dominated countries, should prove to all reasonable persons that the Law of Almighty God does not change, nor does the course of conduct of His servants acting according to the dictates of His commandments, and reminds all of the wise counsel given in the days of the apostles by the sage justice, Gamaliel, who, among other things said: "Refrain from these men, and let them alone; for if this counsel or this work be of men, it will come to nought: but if it be of God, ye cannot overthrow it; lest haply ye be found even to fight against God." —Acts 5:34-40.

[16] "George Washington, the almost universal character of whose wisdom always freshly surprises a century later wrote a letter to the descendants of those whom William Penn brought with him. In it General Washington said:

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[16] Clark, J., *Minersville Dist* v. *Gobitis* (CCA-3) 108 F. 2d 683.

'Government being, among other purposes, instituted to protect the persons and consciences of men from oppression it certainly is the duty of rulers, not only to abstain from it themselves, but according to their stations to prevent it in others.

'I assure you very explicitly, that in my opinion the conscientious scruples of all men should be treated with great delicacy and tenderness; and it is my wish and desire, that the laws may always be as extensively accommodated to them, as a due regard to the protection and essential interests of the nation may justify and permit.'

—Writings of George Washington (Sparks Ed. Vol. 12, pp. 168-169), Letter to the Religious Society Called Quakers, October, 1789.

"The appellant School Board has failed to 'treat the conscientious scruples' of all children with that 'great delicacy and tenderness'. We agree with the father of our country that they should and we concur with the learned District Court in saying that they must." [16]

We submit that the statutes and regulation, *as construed and applied*, violate the constitutional rights of appellees; therefore the judgment of the trial court granting the permanent injunction should be affirmed.

Respectfully and confidently,

HAYDEN C. COVINGTON
117 Adams St., Brooklyn, N. Y.
Attorney for Appellees

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[16] Clark, J., *Minersville Dist.* v. *Gobitis* (CCA-3) 108 F. 2d 683.

APPENDIX A

CHILDREN'S KNOWLEDGE OF THE FLAG SALUTE

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[*Reprinted from the December, 1941 issue of the Journal of Educational Research*]

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[*Editor's note:* In these trying times, there is naturally and rightfully concern over our common welfare. The author presents data on the children's knowledge of the flag salute.]

■

IN MANY schools every morning during the opening exercises children are required to indicate their devotion to their country by saying the Flag Salute. Day after day they continue to vow:

I pledge allegiance to the Flag of the United States of America and to the Republic for which it

stands; one nation, indivisible, with liberty and justice for all.

To what extent does this oral verbalization of the pledge result in the children's actually knowing and understanding the meaning of the Salute? The study here reported is an effort to present some facts bearing upon this question.

Teachers from thirteen schools systems, varying in size from rural districts to cities with populations ranging between twenty and thirty thousand, were requested to have their children from the third through the twelfth grade write the Flag Salute. To insure against coaching by teachers or possibilities that the pupils would especially prepare for this task, no warning of the forthcoming exercise was given. In order to test largely the influence of the oral verbalization of the Salute, rooms in which intensive work on the pledge, such as practice in writing it for written composition work, were not included in the study. The number excluded, however, was small, representing only some ten per cent of the rooms which were selected at random. In all, 2883 children wrote the pledge. Fifty-seven per cent of all the data was collected during the school year of 1939-40, forty-three per cent in 1940-41.

In the scoring of the papers, the chief criterion was the meaning revealed. Six types of errors were tabulated:

(1) "noncomprehensions" which included attempts to write words that had no plausible resemblance, phonetic or otherwise, to any English words,

(2) substitutions of words,

(3) omissions of words,

(4) transpositions of words,

(5) insertions of words,

(6) misspellings.

In the scoring, such mechanics as capitalization, punctuation, syllabication, abbreviation, crossing of t's, dotting of i's, and the child's handwriting were not considered.

Since a child's understanding of the significance of the pledge may or may not be correlated with his ability to write it, the pupils from certain representative rooms, approximating twenty per cent of the total, were asked not only to write the pledge but to state in their own words its meaning. In scoring the meanings, three ideas were considered basic to a fundamental grasp of the significance of the pledge: (1) our country is a land of liberty reflected in, for example, our free speech, trial by jury, free press, etc., (2) assurance of obedience, faithfulness, or obligation to the flag which symbolizes the United States of America, and (3) our country is an indivisible unit, made up of united people living in states which may not secede from the union. The maximum score for meaning was 3. Any idea expressed by a child which reasonably embraced one of the three basic concepts given above was given full credit. No partial scores were granted.

The number of children writing the pledge and the average number of errors in each grade are given in Table 1. As one might anticipate, the number of errors decreases fairly regularly with the increasingly higher grades. However, even in the twelfth grade an average of 3.5 errors was made, excluding many others such as capitalization or punctuation.

TABLE 1

NUMBER OF CHILDREN AND AVERAGE ERRORS FOR EACH GRADE

Grade	Number of Children	Average Errors
3	154	16.0
4	270	13.1
5	258	10.1
6	306	6.9
7	228	6.8
8	146	5.5
9	338	5.5
10	448	5.4
11	407	3.9
12	328	3.5
Total	2883	7.0

The average percentages of types of errors made by the pupils appears in Table 2. In Grade 12, for example, 59 per cent of the total number of errors made consisted of omissions of words, 20 per cent were substitutions, 16 per cent in misspellings, 3 per cent in insertions, 2 per cent in "non-

TABLE 2

PERCENTAGES OF TYPES OF ERRORS IN EACH GRADE

Grade	N	S	O	T	I	M	Total
3	25	6	57	0	7	5	= 100
4	17	13	47	0	0	23	= 100
5	13	16	44	0	5	22	= 100
6	11	20	39	1	4	25	= 100
7	7	19	54	1	3	16	= 100
8	2	17	53	1	2	25	= 100
9	3	17	62	0	6	12	= 100
10	3	17	64	0	4	12	= 100
11	1	16	63	1	4	15	= 100
12	2	20	59	0	3	16	= 100
Average	8.4	16.1	54.2	.4	3.8	17.1	= 100

comprehensions" (symbols which had no reasonable resemblance to any English word), and none in transpositions of words. It will be noted that most errors consisted of omissions. Next in order follow misspellings, substitutions, "noncomprehensions," insertions, and transpositions of words.

The general situation relative to the relationship between a pupil's ability to write the pledge and his explanation of its meaning may be observed in Table 3. Pupils

TABLE 3

AVERAGE NUMBER OF ERRORS ON PLEDGE IN RELATION TO EXPLANATION OF MEANING

Score on Meaning	Average Errors
0	11.4
1	7.7
2	4.4
3	2.1

receiving a score of 0 on their statements explaining the meaning of the pledge had an average of 11.4 errors on the papers containing the words of the pledge; those with a score of 1 averaged 7.7 errors; those with a score of 2 made 4.4 errors; and the ones with a meaning score of 3 averaged only 2.1 errors. Thus there seems to be a strong correlation between ability to write the words of the pledge and an understanding of its meaning. To be sure, since words are our best medium of thought, one might suspect that errors in words might reflect inadequacies or errors in thought. On the other hand, however, a child might be able to recite the words of the pledge perfectly and still have little conception of its meaning. Notwithstanding this latter possibility, the intelligence of the children no doubt is a factor which operates in relation to success both in writing the words and stating the meaning of the pledge.

Below, taken from each grade, is included a sample which is fairly typical of the attempts of the children of a given grade to write the words of the Salute to the Flag as a result of the daily oral verbalization of the pledge. Since the data in Table 2 represent averages of types of errors and not the situation with respect to the individual performances of children, few, if any of the children's papers reflect the particular patterns revealed in the table. This situation is of course one of the familiar limitations of all statistical averages.

GRADE 3

I ploge L. to the flag of U. S. of A. and the p e for wisk It Sand

GRADE 4

I Pleglint to the Flay, of United States of America, and to the land one Naniton Indesvoil with Lirbty and justes for all.

GRADE 5

I pleg the leggens to the flag of the United States of America. To which it stands one nation inavibl for liberty justest for all.

GRADE 6

I plede allengone to the flag of United States of America and to the repulic for which it stands one nation invisble with liberty for all.

GRADE 7

I pledge alligence to the flag of the U. S. of America and to the republic for which it stands one nation indivial with

GRADE 8

I plegde allignace to the flag of United States of America and to the republic to which it stands one nation indivisable, liberty and justice for all.

GRADE 9

I pledge alagances to the flag of the United States of America and to the Republic for which it stands one nation invisable with liberty and ju

GRADE 10

I pledge alliegence to the flay of the United States of America and to whom it stands. One nation indivisible with liberty and justice for all.

GRADE 11

I pledge aliegence to the flag of the U. S. of America and to the Republic for which it stand. One nation indivisible and justice for all.

GRADE 12

I pledge alligence to the flag of the United States and to the liberty for which it stands. One nation indivisible, with liberty and justice for all.

The following represent samples which have been graded 0, 1, 2, and 3 respectively on meaning according to the method of scoring already described.

SCORE 3

That I owe my life to my country. That I would do *anything* for my country. That the United States should be honored. That the United States is not able to be separated. That we have justice (fair trials) and liberty (are free).

SCORE 2

The flag Salute means that we are thankful for our flage, and are ready to serve our country. One nation in the visible means our nation. And we want Liberty and Justice for all United States of America.

SCORE 1

It means Saluting to the flag and promosing you will be loyal and true to your country.

SCORE 0

The Flag and Flag Salute makes me think of my forefathers who fought for our country. It makes me so proud to live under the Red, White and Blue, I hardly know what to do. The Flag makes me feel safe from war-torn Europe. In my eyes the Flag of our Country is "The Gem of the Ocean," long may it (way) wave. I'll feel safe as long as Old Glory is floating in the breeze.

To give the reader some impression as to what the Flag may mean to a few pupils who each morning are requested merely to repeat orally the pledge, some interesting illustrations are included.

I pledge a legend to the United States of America—one nation in the vestibule and that's all".

I plege alegance to the American flag of United State America—for liberty and justice in God.

I pledge alligence to this flag of the United States and to the liberity for which it stands. To this nation indespensible.

The Flag is passing by.

I wear allegience to the flag, of the United States of America, and to the Bepublic, for which it stands—

I pledge Allegiance to the flag, of the United States of America, and to one individual for which it stands

I pledge the legion to the flag, of United States of America and to the Republican for which it stands, one nation individual with liberty and justices for all.

I pledge my allegance, to the flag—one nation, indivincibl. with liberty and death for all.

The data in this study reveal a rather pathetic picture of our attempts to teach children not only the words but the meaning of our Flag Salute which especially today should carry such significant import for the youth of our land.

Though the data of this study are limited to school rooms in which little or no attempt had been centered on having

children write and grasp the meaning of the Salute to the Flag, among the schools approached for cooperation in this study, comparatively few of them had given any intensive consideration to teaching the exact words and meaning of the pledge. The findings however did reveal that during the present school year, no doubt as a result of the war situation, progressively more schools were teaching the pledge beyond the practice of having the children merely mouth the words in a routine manner once each day.

It is obvious that some effective methods for teaching the Flag Salute must be tried by schools. Some suggestive ones come to mind: discussion of the meaning and implications of, as well as the reasons for, giving the pledge; and the use of motion pictures, slides, or other media for the purpose of giving pupils concrete associations with the abstract symbols constituting the pledge. Apparently the method of having children merely repeat orally the vow of allegiance to their country has decided limitations.

APPENDIX B

[See pages 81-84, supra]

Brooklyn, New York, June 10, 1940

National Commander Raymond J. Kelly
American Legion
Indianapolis, Indiana

Dear Sir:

Advance reprint pages of the June issue of the *National Legionnaire* have been called to my attention. I fully concur with you that subversive activities should be suppressed by lawful means.

I am aware of the fact that fanatics often take advantage of a laudable organization and resort to unlawful means. During the past week such fanatics in Texas and Maine and in other places have acted as though they were authorized by the American Legion to inflict punishment upon innocent persons. You have doubtless seen many reports of this in the press. I call your attention to a few:

At Odessa, Texas, a number of Christian people otherwise known as Jehovah's witnesses were distributing *The Watchtower*, a publication which for more than 60 years has been devoted exclusively to the explanation of Bible truths. A mob, claiming to be acting at the instance of the American Legion, fell upon this company of Christian people, ill-used them, had

[APPENDIX B *continued*]

them put in jail and held there more than 24 hours in a crowded room without any accommodations and without food and water, and then taken out and driven down a railroad track in the broiling hot sun not permitting them to stop to get water or other refreshment; and this continued until many of them fainted. To this cruel and unusual punishment can be found no parallel anywhere outside of Germany.

At another place, near Houston, Texas, a Catholic priest led a mob that committed similar assaults upon Jehovah's witnesses, seized their literature and phonographs and destroyed them.

In Kennebunk, Maine, the mob under the same pretext assaulted the building in which several law-abiding citizens known as Jehovah's witnesses resided, broke the windows and broke in the doors and later burned the building to the ground.

These are just a few of like instances that have occurred in the last few days in many of the states.

I beg to call your attention to the fact that the real offenders against the government and against the people are the Nazi agents who are trying to camouflage their own action and to hide the fact that they are the fifth column by wrongfully charging innocent people with being subversive and doing so in the name of the American Legion. I am certain that the American Legion would not endorse any such action. Some of your officers have published in the press in the South statements denouncing such mob action. I am sure you could do much to quell this unlawful action against innocent American citizens by calling attention to the fact in your paper and advising the officers of your organization to attempt to quiet such fanatical persons. I mention this in the interest of good government and righteousness.

I am certain that your organization in nowise endorses mob violence. If anyone has committed an unlawful act, then he should be proceeded against in a lawful manner. Will you please use your influence to suppress a fanatical element that acts in the name of the Legion in committing wrongful acts?

Without a question of a doubt the Nazis have many agents and representatives in America. They are attempting to destroy the nation. These are the ones that should be sought out and dealt with in a lawful manner, but in such an emphatic way that Nazism may not be permitted to overrun this nation as it has many of the nations of Europe.

I should be very glad to have your reply that you in nowise endorse mob action and that you will advise all persons acting in the name of the American Legion to refrain from mob action against all persons who are pursuing a lawful course and who are clearly within their constitutional rights.

Very sincerely yours,

WATCH TOWER BIBLE AND TRACT SOCIETY

J. F. Rutherford, President

FILE COPY

Office - Supreme Court, U. S.
MAR 6 1943
CHARLES ELMORE CROPLEY

IN THE

Supreme Court of the United States

OCTOBER TERM, 1942

No. 591

THE WEST VIRGINIA STATE BOARD OF EDUCATION, composed of HONORABLE W. W. TRENT, President, MARY H. DAVISSON, THELMA B. LOUDIN, RAYMOND BREWSTER, LYDIA C. HERN, L. V. THOMPSON, and MRS. DOUGLAS W. BROWN, and all other boards, officials, teachers and persons subject to the jurisdiction and control of said STATE BOARD OF EDUCATION,

Defendants-Appellants,

vs.

WALTER BARNETTE, PAUL STULL, and LUCY McCLURE,

Plaintiffs-Appellees.

ON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA

BRIEF FOR AMERICAN CIVIL LIBERTIES UNION, *AMICUS CURIAE*

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1942

No. 591

THE WEST VIRGINIA STATE BOARD OF EDUCATION, composed of HONORABLE W. W. TRENT, President, MARY H. DAVISSON, THELMA B. LOUDIN, RAYMOND BREWSTER, LYDIA C. HERN, L. V. THOMPSON, and MRS. DOUGLAS W. BROWN, and all other boards, officials, teachers and persons subject to the jurisdiction and control of said STATE BOARD OF EDUCATION,

Defendants-Appellants,

vs.

WALTER BARNETTE, PAUL STULL, and LUCY McCLURE,

Plaintiffs-Appellees.

ON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA

BRIEF FOR AMERICAN CIVIL LIBERTIES UNION, *AMICUS CURIAE*

Preliminary Statement

The American Civil Liberties Union is a non-partisan, non-sectarian organization, national in scope, with members in the State of West Virginia. The purpose of the

American Civil Liberties Union is to defend the fundamental liberties guaranteed to all Americans, regardless of creed, class or condition, by the Bill of Rights. Because the American Civil Liberties Union firmly believes that "our democratic form of government functioning under the historic Bill of Rights has a high responsibility to accommodate itself to the religious views of minorities however unpopular and unorthodox those views may be" (cf. dissent of Justices Black, Douglas and Murphy in *Jones* v. *City of Opelika*, 316 U. S. 584 at 623 (1942)), this brief *amicus curiae* is filed. It is solely in the interests of religious tolerance and reasonable solutions that the undersigned—none of whom are members of Jehovah's Witnesses or subscribers to their view on flag-saluting—have subscribed their names to this brief in support of the unanimous decision of the District Court for the Southern District of West Virginia (sitting as a three-judge court) (47 F. Supp. 251) (R. 48-54)*. It is submitted that the opinion of Circuit Judge Parker correctly decided the case and should be upheld by this Court.

The Issue

The only issue before the Court below, and the only issue before this Court on appeal, is whether the regulation of the West Virginia Board of Education**, which requires all pupils in public schools to salute the flag in a specified manner and provides that failure to salute shall be dealt with as "insubordination", when applied to the appellees, who admittedly have religious scruples about

---

* References to the Record are indicated "R."

** The full text of this regulation, adopted Jan. 9, 1942, is set forth in Appendix A.

saluting the flag (see opinion below, R. 54, 47 F. Supp. 251, at 253), is a valid and constitutional regulation?

The Court below held "that the regulation of the Board requiring that school children salute the flag is void in so far as it applies to children having conscientious scruples against giving such salute and that, as to them, its enforcement should be enjoined" (47 F. Supp. 251, at 255).

Statement of the Case

The facts are well summarized in the first paragraph of the opinion of the Court below as follows (R. 49):

> "This is a suit by three persons belonging to the sect known as 'Jehovah's witnesses', who have children attending the public schools of West Virginia, against the Board of Education of that state. It is brought by plaintiffs in behalf of themselves and their children and all other persons in the State of West Virginia in like situation, and its purpose is to procure an injunction restraining the State Board of Education from enforcing against them a regulation of the Board requiring children in the public schools to salute the American flag. They allege that they and their children and other persons belonging to the sect of 'Jehovah's witnesses' believe that a flag salute of the kind required by the Board is a violation of the second commandment of the Decalogue, as contained in the 20th chapter of the book of Exodus; that because of this belief they cannot comply with the regulation of the Board; that, if they fail to comply, the children will be expelled from school, and thus be deprived of the benefits of the state's public school system; and that plaintiffs, in such event, will have to provide them education in private schools at great expense or be subjected to prosecution for crime for failing to send them to school, as required

by the compulsory school attendance law of the state. They contended, therefore, that the regulation amounts to a denial of religious liberty and is violative of rights which the first amendment to the federal Constitution protects against impairment by the federal government and which the 14th Amendment protects against impairment by the States."

The defendants-appellants moved to dismiss the bill on the ground that the regulation of the Board was a proper exercise of the statutory power vested in it and that under the doctrine of *Minersville School District* v. *Gobitis*, 310 U. S. 586, the flag salute, which the regulation requires, cannot be held a violation of the rights of the plaintiffs-appellees (R. 43-45). The parties agreed that it be submitted for final decree on the bill and motion to dismiss. The Court denied the motion and issued an injunctive order enjoining the Board from enforcing the regulation against children having conscientious scruples against giving such salute (R. 45-46).

The appellants are the acting Board of Education of the State of West Virginia and joined with them are all other boards, officials and teachers subject to its control. This Board has general supervision over all public schools in West Virginia and is given power to determine the State's educational policies (except those of the State University) and to "make rules for carrying into effect the laws and policies of the State relating to education". (*The West Virginia Code of 1937*, Sec. 1730, Chap. 18, Art. 2, Sec. 5.) The statutes further provide that minors must attend public schools, or obtain equivalent private instruction, until they reach the age of sixteen. (*Op. Cit.* 1941 Cumulative Supplement, Sec. 1847, Chap. 18, Art. 8, Sec. 1.)

The instruction to be given in public schools includes "instruction in the history of the United States, in civics, and in the constitutions of the United States and of the State of West Virginia, for the purpose of teaching, fostering and perpetuating the ideals, principles and spirit of Americanism." (*Op. Cit.* Sec. 1734, Chap. 18, Art. 2, Sec. 9.)

On January 9, 1942, The West Virginia State Board of Education adopted the regulation here in question. The full text of the regulation is set forth in Appendix A. It will be noted that the regulation requires all teachers and pupils to participate in the "commonly accepted salute to the Flag of the United States" as a "regular part of the program of activities in the public schools". The prescribed salute as stated in the regulation is as follows: "the right hand is placed upon the breast and the following pledge is repeated in unison: 'I pledge allegiance to the Flag of the United States of America and to the Republic for which it stands; One Nation, indivisible, and with liberty and justice for all.'"

It is not to be overlooked that the regulation provides for a penalty for failure to perform the salute (in the precise manner prescribed) as follows:

> "provided, however, that the refusal to salute the Flag be regarded as an act of insubordination and shall be dealt with accordingly."

The West Virginia Code (1941 Cumulative Supplement, Sec. 1851, Chap. 18, Art. 8, Sec. 5a) provides for dealing with insubordination of pupils as follows:

> "If a child be dismissed, suspended or expelled from school because of refusal of such child to meet the legal and lawful requirements of the school and the established regulations of the county and/or

> state board of education, further admission of the child to school shall be refused until such requirements and regulations be complied with. Any such child shall be treated as being unlawfully absent from the school during the time he refuses to comply with such requirements and regulations, and any person having legal or actual control of such child shall be liable to prosecution under the provisions of this article for the absence of such child from school."

By Sec. 1851 and Sec. 1847 of the Code (*Op. Cit.*) such persons would be guilty, if convicted, of a misdemeanor and subject to a fine not exceeding $50 and a jail term of not exceeding thirty days.

Furthermore the children may be proceeded against as delinquents under Chap. 49, Art. 1, Sec. 4 and Art. 5, Sec. 1 of *The West Virginia Code* (1941 Cumulative Supplement. Sec. 4904 (4) and 4904 (49)).

The views of Jehovah's Witnesses on flag-saluting are so well known to this Court that it is unnecessary to summarize them here at length. (Cf. Briefs filed in *Minersville School District* v. *Gobitis*, 310 U. S. 586 (1940); *Johnson* v. *Deerfield*, 306 U. S. 621 (1939); *Hering* v. *State Board*, 303 U. S. 624 (1938); *Leoles* v. *Landers*, 302 U. S. 65 (1937).) They are sufficiently summarized for this appeal in the excerpt from the opinion of the Court below quoted at page 3 above. A full exposition may be found in the sole Exhibit introduced in the proceedings in the Court below (R. 16-43), which is a pamphlet entitled "God and the State". It should be noted that Jehovah's Witnesses are taught, and in turn teach their children, that saluting the flag is idolatrous, that it violates the second commandment of the Decalogue (Exodus 20:3-5) (R. 49) and that if they salute the flag

in violation of that commandment, the penalty is "death everlasting, from which there is no resurrection"; while if they refuse to salute, "the most severe punishment the State can inflict upon him is death, from which death God will resurrect his faithful servants who have been put to death by man because of faithfulness to God." (Exhibit A, R. 41.)

Summary of Argument

In support of the decision of the District Court, argument is submitted on the following points:

1. The decision of this Court in *Minersville School District* v. *Gobitis*, 310 U. S. 586, should be reversed.

2. Enforcement of the regulation of the State Board, in so far as persons holding a religious belief and doctrine against giving the flag salute are concerned, deprives such persons of religious liberty and violates the Fourteenth Amendment to the Constitution of the United States.

3. Such deprivation of religious liberty is without due process of law since the State Board's regulation is not a proper exercise of the State's police power.

4. Congress having entered the field of legislation by the enactment of Sec. 7 of the Act of June 22, 1942, and having expressed the national policy in the matter of saluting the Flag of the United States, the regulation of the State Board is invalid.

POINT I

The decision of this Court in *Minersville School District* v. *Gobitis* (310 U. S. 586) should be reversed.

Affirmance of the decision of the Court below requires that this Court reverse its decision in *Minersville School District* v. *Gobitis*, 310 U. S. 586. The facts in that case were in all essential respects the same as in this case save for the fact that a regulation of the Minersville School District of Pennsylvania, instead of a regulation of the West Virginia State Board of Education was in issue.

We urge, first, that the *Gobitis* case was wrongly decided. This assertion is based, not upon the opinion of the legal profession generally (although such opinion has been preponderantly unfavorable to the *Gobitis* decision); but upon the expressed opinion of four of the seven justices, now members of this Court, who participated in the *Gobitis* decision. (*Op. Cit.*, 310 U. S. 586, dissenting opinion; *Jones* v. *City of Opelika*, 316 U. S. 584, special dissenting opinion.)

Only one of the unfortunate effects of the *Gobitis* decision has been the efforts to use it to justify the conviction of children refusing to give the salute on the ground that they are delinquents, and to take such children from their homes and confine them to State Reformatories. To the credit of all the higher courts, which have considered the question, however, they have "shrunk from so barbaric a result". (Cf. "*The Gobitis Case in Retrospect*" (1941), 1 Bill of Rights Rev. 627.) As the Supreme Court of New Hampshire said in such a case (*State* v. *Lefebvre*, 20 A. (2d) 185, 187 (N. H. 1941):

> "If the order appealed from is executed, these three children and their parents will be visited with

> the breaking up of the family, an institution of primary value in our social life. * * * it is impossible for us to attribute to the Legislature an intent to authorize the breaking up of family life for no other reason than because some of its members have conscientious religious scrupies not shared by the majority of the community * * *."

Other courts have reached the same decision as the New Hampshire Supreme Court in refusing to carry the implications of the *Gobitis* decision to such an extreme result. *Commonwealth* v. *Johnson*, 309 Mass. 476; *Kansas* v. *Smith*, 155 Kansas 588; *Bolling* v. *Superior Court*, Washington S. C. No. 28909, Filed Jan. 29, 1943, opinion as yet unpublished; *In re Reed*, 262 App. Div. (N. Y.) 858; *Commonwealth* v. *Nemchik* (unpublished) (Court of Quarter Sessions, Luzerne Co., Penna.).

The precise question at issue in these cases admittedly was not before this Court in the *Gobitis* case. Now, however, that this Court has an opportunity to reverse that unfortunate decision, the record of attempts to apply it so as to make criminals of school children whose only "crime" is, in obedience to conscience, to refuse to salute the flag, cannot be overlooked by this Court.

Chief Justice Stone's dissent in the *Gobitis* case has impressed us deeply and the following short paragraph from his opinion sets forth in moving and succinct fashion the doctrine which we hope this Court may now think it proper to adopt:

> "The guaranties of civil liberty are but guaranties of freedom of the human mind and spirit and of reasonable freedom and opportunity to express them. They presuppose the right of the individual to hold such opinions as he will and to give them reasonable free expression, and his free-

> dom, and that of the state as well, to teach and persuade others by the communication of ideas. The very essence of the liberty which they guarantee is the freedom of the individual from compulsion as to what he shall think and what he shall say, at least where the compulsion is to bear false witness to his religion. If these guaranties are to have any meaning they must, I think, be deemed to withhold from the state any authority to compel belief or the expression of it where that expression violates religious convictions, whatever may be the legislative view of the desirability of such compulsion."
>
> *Minersville School District, et al.* v. *Gobitis*, 310 U. S. 586, 604.

We urge as a second ground for reversal the fact that Congress, since the *Gobitis* case was decided, has entered "the field of legislation here under discussion". (Cf. *Minersville School District* v. *Gobitis*, 310 U. S. 586, prevailing opinion at 600.) By Act of June 22, 1942 (Title 36 U. S. C. A. Supp. 1942, Sec. 172) Congress has prescribed the manner in which the flag of the United States shall be saluted. Since this is a Congressional enactment in a field of national cognizance, a statute or regulation of any State (especially if it conflicts with the Act of Congress) must be invalid.

Our Points II and III, which follow, are directed at sustaining the first ground and our Point IV, the second ground, for reversal of the *Gobitis* case, as stated above.

POINT II

Enforcement of the regulation of the State Board, in so far as persons holding a religious belief and doctrine against giving the flag salute are concerned, deprives such persons of religious liberty and violates the Fourteenth Amendment to the Constitution of the United States.

A. Liberty of religious belief and doctrine is protected by the Fourteenth Amendment against impairment by the States.

Since the decision of this Court in *Cantwell* v. *Connecticut*, 310 U. S. 296, there is no longer any doubt that religious liberty is protected from impairment by the States by the Fourteenth Amendment.

In that case (at p. 303) this Court said:

> "The fundamental concept of liberty embodied in that amendment (i.e. the Fourteenth Amendment) embraces the liberties guaranteed by the First Amendment. The First Amendment declares that Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof. The Fourteen Amendment has rendered the legislatures of the states as incompetent as Congress to enact such laws."

B. The belief and doctrine of appellees is religious in character.

The fact that the vast majority of Americans do not see in the salute to the national Flag other than a "ceremony calculated to inspire in the pupils a proper love of country and reverence for its institutions" (opinion

below) (R. 50-51) does not belie the fact that Jehovah's Witnesses are quite honest and sincere in their belief that saluting the flag is idolatrous. The inability of the majority to comprehend the religious significance of the flag salute to which these appellees are opposed should not lead the Court to attempt to decide when a belief is a religious one.

On this point we quote also the opinion of the Court below (R. 51):

> "Courts may decide whether the public welfare is jeopardized by acts done or omitted because of religious belief; but they have nothing to do with determining the reasonableness of the belief. That is necessarily a matter of individual conscience. There is hardly a group of religious people to be found in the world who do not hold to beliefs and regard practices as important which seem utterly foolish and lacking in reason to others equally wise and religious; and for the courts to attempt to distinguish between religious beliefs or practices on the ground that they are reasonable or unreasonable would be for them to embark upon a hopeless undertaking and one which would inevitably result in the end of religious liberty."

This Court has forcefully condemned as "censorship of religion" a State Statute which conferred on a public official the power to determine whether or not a cause was a religious one. (*Cantwell* v. *Connecticut*, 310 U. S. 296, 305.)

The Supreme Court of Washington in a recent case (*Bolling* v. *The Superior Court* (opinion as yet unpublished) No. 28909, Filed Jan. 29, 1943) gives an interesting historical example of the religious significance of a gesture:

"Many examples of the importance of a mere gesture may be found in history. In the time of the Roman empire it was customary for the people to burn a pinch of incense before a statue of the emperor. The early Christians, while recognizing the sovereignty of the emperor, refused to perform this ceremony, deeming it idolatrous. Pliny the Younger, a lawyer of distinction, acting as governor of a Roman province in Asia Minor, had occasion to write to his friend, the Emperor Trajan, describing his difficulties in ferreting out and punishing Christians, as such, residing within his jurisdiction. He refers to the fact that an order to offer incense before the statue of the emperor was one test applied to ascertain whether or not a particular individual was a Christian. A refusal to perform the rite was equivalent to an affirmation that the one refusing was a Christian, and subject to the severe penalties of the Roman law. A phrase, or the making of a gesture, which to most people may seem either right or possibly unimportant, may to others appear to be of great significance."

C. The State of West Virginia deprives the appellees of liberty guaranteed to them by the Fourteenth Amendment by requiring them to surrender it as a condition of attending public schools of that State.

The West Virginia State Board of Education has been constituted by the Legislature of that State to have control over that State's public school system. (*The West Virginia Code*, Sec. 1730, Ch. 18, Art. 2, Sec. 5.) Accordingly action of that Board is state action for the purposes of this case. (*Lovell* v. *City of Griffin*, 303 U. S. 444; *Missouri ex rel. Gaines* v. *Canada*, 305 U. S. 337.)

The provisions of the regulation of the State Board (App. A) are clear: a child must salute the flag, and if he refuses he is guilty of an act of insubordination; he

may be expelled and proceeded against as a delinquent. (*The West Virginia Code*, 1941 Cumulative Supplement, Sec. 4904 (4) and 4949 (49).) Since every child is required to attend school until he is sixteen (*Op. Cit.*, Sec. 1847) the regulation of the State Board, as applied to children of these appellees, amounts to withholding from them the privileges of public school education unless they abjure their religious convictions. This, we submit, is to deprive them of their religious liberty. (*Terral* v. *Burke Construction Co.*, 257 U. S. 529; and cf. *Missouri ex rel. Gaines* v. *Canada*, 305 U. S. 337, and *Hamilton* v. *Regents*, 293 U. S. 245.)

The question then arises as to whether they are deprived of such liberty by due process of law.

POINT III

Such deprivation of religious liberty is without due process of law since the State Board's regulation is not a proper exercise of the State's police power.

Discussion of this point brings us to the main point of dispute in this case. Of the sincerity of the religious beliefs of these appellees no question has been raised. The State has threatened to deprive them of their religious liberty and to deprive them of other liberties and privileges. In the language of the opinion below, "*Can it be said • • • that the requirement that school children salute the flag has such a direct relation to the safety of the state, that the conscientious objections of plaintiffs must give way?*"

A. The Courts and not the State legislative authorities must decide when religious liberty must yield to the exercise of a State's police power.

With due respect it is nevertheless submitted that one of the most unfortunate aspects of the *Gobitis* decision was the expressed doctrine that the courts are not free to pass judgment upon the legislative opinion that "the country will be better served by conformity than by the observance of the religious liberty which the Constitution prescribed." To say that "the courtroom is not the arena for debating issues of educational policy" is to overlook entirely the religious liberty aspect of the present issue. The State Board by its regulation (App. A) is not trying *to educate* the children of the appellees in any true sense; it is admittedly trying *to compel* them to perform an act (which their religion forbids them to perform). If this Court holds that it will no longer scrutinize legislation to determine when constitutional rights must yield to the exercise of the police power, then it will be abdicating the most important duty which rests on it under the Constitution. The effect of any such doctrine will be to enhance beyond any previous conception the police power of the states and religious liberty will be at the mercy of shifting political majorities. "Constitutional rights are not subject to nullification by reference to a popularity poll." (Alexander, J., dissenting in *Cummings* v. *State* (Supreme Court of Mississippi, No. 35155, Jan. 25, 1943, opinion not yet published).) We cannot believe that this Court has intended to hold—or will hold—that religious liberty, or any liberty guaranteed by the Bill of Rights, is a "local question".

We approve the language of the opinion of Judge Parker in the Court below (R. 53):

> "This bill of rights is not a mere guide for the exercise of legislative discretion. It is part of the fundamental law of the land, and is to be enforced as such by the courts. If legislation or regulations of boards conflict with it, they must give way; for the fundamental law is of superior obligation."

B. In a case involving minorities, the Courts should make an even more searching judicial inquiry to see that any abridgment of the liberties of such minorities is by due process of law.

The appellees in this case are members of a religious minority which has been subjected to persecutions unparalleled in this country since the days of the Mormons. The whole story of the prejudice against, and persecution of, Jehovah's Witnesses has been told many times elsewhere. (Cf. for example, the pamphlet of the American Civil Liberties Union, "Jehovah's Witnesses and the War", Jan. 1943, a copy of which is annexed to this brief.) It is even safe to assume that the regulation of the School Board (adopted in January, 1942) (App. A) which is involved in this case was conceived in the milieu of prejudice which has grown up against these people because of their misunderstood attitude on flag-saluting.

It is submitted that this is "a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities", and calls "for a correspondingly more searching judicial inquiry". (*United States* v. *Carolene Products Co.*, 304 U. S. 144, 152-153.)

It is not enough that the "effective means of inducing political changes are left free from interference". (*Minersville School District* v. *Gobitis*, 310 U. S. 586, 600.)

In the case of minorities such as Jehovah's Witnesses the effectiveness of such means may be purely illusory. A persecuted minority may suffer long before it can alleviate its burdens by way of the ballot box. It looks, and has the right to look under our Constitutional system, to the courts, and particularly to this Court, for redress of grievances.

It may be significant that since the *Gobitis* case was decided in 1940 no legislature or school board, so far as we know, has repealed or modified a compulsory flag salute law or regulation. Indeed some additional states have adopted it—including West Virginia, whose regulation is at issue in this case. Pragmatically, this does not commend the doctrine that somehow legislative authorities will themselves abandon "foolish legislation" if "the effective means of inducing political changes are left free".

We maintain that compulsion has never in this country been the handmaiden to patriotism. Neither the Constitution nor the courts are powerless to exorcise the whiplash of tyranny over a religious minority from our national scene. In the words of Chief Justice Stone in his dissent in the *Gobitis* case:

> "The Constitution expresses more than the conviction of the people that democratic processes must be preserved at all costs. It is also an expression of faith and a command that freedom of mind and spirit must be preserved, which government must obey, if it is to adhere to that justice and moderation without which no free government can exist. For this reason it would seem that legislation which operates to repress the religious freedom of small minorities, which is admittedly within the scope of the protection of the Bill of Rights, must at least be subject to the same judicial scrutiny as legis-

lation which we have recently held to infringe the constitutional liberty of religious and racial minorities."

Minersville School District, et al. v. *Gobitis*, 310 U. S. 586, 606, 607.

C. The test to be applied is whether the failure to salute the flag as required by the State Board's regulation presents such a "clear and present danger to the community" as to justify the State's exercise of its police power to the extent of overriding appellees' religious liberty.

Freedom of religion implies not only freedom of belief but also freedom to act upon belief, so long as such action does not endanger the safety of the State. (*Cantwell* v. *Connecticut*, 310 U. S. 296.) No one contends "that what a man may do or refrain from doing in the name of religious liberty is without limitations". (Opinion below (R. 52).) This Court has held that he may not refuse to bear arms (*Hamilton* v. *Regents*, 293 U. S. 245) and he may not engage in polygamy or other practices which endanger the public health, morals or safety of the community. (*Davis* v. *Beason*, 133 U. S. 333.)

In cases involving freedom of speech and the exercise of police power this Court has wisely announced and applied the "clear and present danger" rule. This means that freedom of speech is not to be abridged unless its exercise presents a clear and present danger to the community. (*Bridges* v. *California*, 314 U. S. 252; *Herndon* v. *Lowry*, 301 U. S. 242; Cf. *Reynolds* v. *United States*, 98 U. S. 145, 163.) There is every reason to apply this same rule to the exercise of religious freedom.

Can it be said that the religious freedom of the appellees must give way because there is a clear and present danger to the State if these school children do not salute the flag? If grown men can advocate doctrines tending

to the overthrow of the government under the constitutional guaranty of freedom of speech (so long as their advocacy does not present a clear and present danger to society), it is absurd to say that the failure of school children to salute the flag presents any greater danger to public safety.

Indeed the policy implicit in the State Board's regulation—to compel the child to salute and to punish him as a delinquent if he does not—not only has no tendency to instruct the children of West Virginia in loyalty to the flag and Constitution of the United States, but on the contrary, instils hatred and bitterness in such children and their parents. As such the conduct of the State Board —not the children who fail to salute—is the more "clear and present danger" to society.

As succinctly stated by Judge Parker in the opinion below (R. 54):

> "The salute of the flag is an expression of the homage of the soul. To force it upon one who has conscientious scruples against giving it, is petty tyranny unworthy of the spirit of this Republic and forbidden, we think, by the fundamental law. This court will not countenance such tyranny but will use the power at its command to see that rights guarteed by the fundamental law are respected."

The fact that we have constitutional guaranties requires accommodation of the powers which government normally exercises, when no question of civil liberties is involved, to the constitutional demand that those liberties be protected against the action of government itself. (*Minersville School District* v. *Gobitis*, 310 U. S. 586, 603.) "Unnecessary clashes" between the proper demands of the State and the dictates of conscience should be avoided. (*United States* v. *McIntosh*, 283 U. S. 605.)

POINT IV

Congress having entered the field of legislation by the enactment of Sec. 7 of the Act of June 22, 1942 (Public Law 623, 77th Cong. Ch. 435, 2nd Sess., Tit. 36 U. S. C. A. Supp. 1942, Sec. 172), and having expressed the national policy in the matter of saluting the flag of the United States, the regulation of the State Board is invalid.

At the time that the *Gobitis* case was decided by this Court, Congress had not entered the field of legislation and the opinion of the majority in the *Gobitis* case took note of this fact. (310 U. S. 586, 600.) However, on June 22, 1942, Congress enacted the following as a part of a codification of the rules and customs regarding the use of and respect due the flag of the United States:

> "Sec. 7. That the pledge of allegiance to the flag, 'I pledge allegiance to the flag of the United States of America and to the Republic for which it stands, one Nation indivisible, with liberty and justice for all', be rendered by standing with the right hand over the heart; extending the right hand, palm upward, toward the flag at the words 'to the flag' and holding this position until the end, when the hand drops to the side. However, civilians will always show full respect to the flag when the pledge is given by merely standing at attention, men removing the headdress. Persons in uniform shall render the military salute."

Since it is the purpose of the salute to the flag to promote "national cohesion" and "national unity" (*Minersville School District* v. *Gobitis*, 310 U. S. 586, 596-7), the subject is of national cognizance and the Act of Congress

renders the acts and regulations of State legislative authorities invalid, whether or not they conflict with the Act of Congress.

Two flags float above the State House of most states—on the left the flag of the state, on the right the flag of the United States. Each is the emblem of an independent political society organized directly by its citizens. If the government in Washington should assume to imprison West Virginia children for refusing to salute the emblem of that state, citizens of West Virginia would feel very properly that the representatives of New York and California were meddling in matters with which they had no concern. It is for the citizens of West Virginia to determine what observance the state demands of children, and to decide what laws will best support the honor of their flag.

Conversely, it is not for West Virginia to put the Stars and Stripes in the position where innocent children following the dictates of religious training might suffer physical injury or impairment of their intellectual development because the children do not yield it what West Virginia considers suitable respect. This is a matter that concerns Maine, and New York, and California. It concerns the unity of a hundred and thirty million people. Only the representatives of that hundred and thirty million can establish the ceremony for saluting the American flag and define and punish the offense of disloyalty to the common emblem of the United States.

We submit that the present case is governed, in principle, by *Hines* v. *Davidowitz*, 312 U. S. 52. There a Pennsylvania statute for the registration of aliens was held invalid because Congress had dealt with the same subject in a national act. There was nothing in the Federal Constitution to forbid Pennsylvania to register aliens,

nor did the Pennsylvania statute conflict with the Act of Congress in the sense that it was not perfectly practicable for aliens to obey both at once. Nevertheless the Pennsylvania statute was declared invalid because the subject was one of national cognizance and because Congress had indicated by its enactment the policy which it had determined to pursue. We submit that the obligation of citizens towards the national emblem is even more clearly of national cognizance.

Nevertheless in this case the situation is not merely that Congress and the State Board are occupying the same field with perfectly consistent legislation. The fact is that the State Board's prescribed method of saluting the flag *conflicts* with that prescribed by Congress. *Congress says:* "* * * civilians will always show full respect to the flag when the pledge is given by merely standing at attention * * *". *The West Virginia State Board orders:* "* * * that the commonly accepted salute to the Flag of the United States—the right hand is placed upon the breast and the following pledge repeated * * * and that all teachers * * * and pupils * * * shall be required to participate in the salute * * *".

If Congress in a field of national cognizance says that proper respect for the flag may be shown merely by standing at attention, it is not proper for West Virginia or any other state or local authority to require more and to seek to compel a particular form of salute which Congress has not seen fit to adopt. (*Adams Express Co.* v. *Croninger*, 226 U. S. 491 506; *Charleston & Western Carolina Railway Co.* v. *Varnville Furniture Co.*, 237 U. S. 597.)

Furthermore and of great importance is the fact that Congress did not deem it wise, or see fit, to impose any

penalties for failure to salute the flag. Obviously West Virginia may not create an offense and prescribe a penalty as to a matter of national concern, as to which Congress has legislated, but for which it has prescribed no penalty.

In *Charleston & Western Carolina Railway Co.* v. *Varnville Furniture Co.*, 237 U. S. 597, at 604, Justice Holmes said:

> "When Congress has taken the particular subject matter in hand coincidence is as ineffective as opposition, and a state law is not to be declared a help because it attempts to go farther than Congress has seen fit to go. *Chicago, R. I. & Pacific Ry.* v. *Hardwick Elevator Co.*, 226 U. S. 426, 435, *Southern Railway* v. *Indiana Railroad Commission*, 236 U. S. 439, 446, 447. The legislation is not saved by calling it an exercise of the police power * * *."

Conclusion

The regulation of the State Board is unconstitutional, and it is invalid because it is in conflict with an Act of Congress legislating in a field of national cognizance. The decision in *Minersville School District* v. *Gobitis* (310 U. S. 586) should be reversed and the decision of the District Court should be affirmed.

Respectfully submitted,

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APPENDIX A

Resolution of the West Virginia State Board of Education adopted January 9, 1942

WHEREAS, The West Virginia State Board of Education holds in highest regard those rights and privileges guaranteed by the Bill of Rights in the Constitution of the United States of America and in the Constitution of West Virginia, specifically, the first amendment to the Constitution of the United States as restated in the fourteenth amendment to the same document and in the guarantee of religious freedom in Article III of the Constitution of this State, and

WHEREAS, The West Virginia State Board of Education honors the broad principle that one's convictions about the ultimate mystery of the universe and man's relation to it is placed beyond the reach of law; that the propagation of belief is protected whether in church or chapel, mosque or synagogue, tabernacle or meeting house; that the Constitution of the United States and of the State of West Virginia assure generous immunity to the individual from imposition of penalty for offending, in the course of his own religious activities, the religious views of others, be they a minority or those who are dominant in the government, but

WHEREAS, The West Virginia State Board of Education recognizes that the manifold character of man's relations may bring his conception of religious duty into conflict with the secular interests of his fellowman; that conscientious scruples have not in the course of the long struggle for religious toleration relieved the individual from obedience to the general law not aimed at the promotion or restriction of the religious beliefs; that the mere possession of convictions which contradict the relevant concerns of political society does not relieve the citizen from the discharge of political responsibility, and

WHEREAS, The West Virginia State Board of Education holds that national unity is the basis of national security; that the flag of our Nation is the symbol of our National Unity transcending all internal differences, however large within the framework of the Constitution; that the Flag is the symbol of the Nation's power; the emblem of freedom in its truest, best sense; that it signifies government resting on the consent of the governed, liberty regulated by law, protection of the weak against the strong, security against the exercise of arbitrary power, and absolute safety for free institutions against foreign aggression, and

WHEREAS, The West Virginia State Board of Education maintains that the public schools, established by the legislature of the State of West Virginia under the authority of the Constitution of the State of West Virginia and supported by taxes imposed by legally constituted measures, are dealing with the formative period in the development in citizenship that the Flag is an allowable portion of the program of schools thus publicly supported.

Therefore, be it RESOLVED, That the West Virginia Board of Education does hereby recognize and order that the commonly accepted salute to the Flag of the United States—the right hand is placed upon the breast and the following pledge repeated in unison: "I pledge allegiance to the Flag of the United States of America and to the Republic for which it stands; one Nation, indivisible, with liberty and justice for all"—now become a regular part of the program of activities in the public schools, supported in whole or in part by public funds, and that all teachers as defined by law in West Virginia and pupils in such schools shall be required to participate in the salute honoring the Nation represented by the Flag; provided, however, that refusal to salute the Flag be regarded as an act of insubordination, and shall be dealt with accordingly.

JEHOVAH'S WITNESSES AND THE WAR

"The essence of religion is belief in a relation to God involving duties superior to those arising from any human relations".

Chief Justice Charles E. Hughes — U.S. v. Macintosh

American Civil Liberties Union
170 Fifth Avenue
New York City

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January, 1943

JEHOVAH'S WITNESSES AND THE WAR

Introduction

THE undersigned join in presenting this extraordinary record of attacks upon the liberties of a religious organization. The attacks constitute a challenge to democratic liberty and religious tolerance. They present in new form the ancient conflict that at times arises between men's convictions of their duty to God and the commands of the State.

Jehovah's Witnesses have been subjected to a religious persecution unmatched in our history as a nation save for the violence years ago against the Mormons. More than any other minority they are suffering war-time attack on their freedom of conscience; yet their only offenses (outside a few cases of disorderly conduct) are their refusal to salute the flag, their insistence upon conducting their ministry in public, the distribution of literature in public places and house-to-house—often, it is true, by annoying methods; and the refusal of their men of military age to accept military service. Yet they do not call themselves pacifists, for they are committed to fight in a war for Jehovah—an obviously academic reservation.

The record in these pages shows that thousands of their children have been expelled from the public schools all over the country for refusal to salute the flag; that several hundred men of military age are imprisoned for refusing compulsory military service; that they alone have been the victims of "patriotic" mob violence; that hundreds of their members have been arrested for distributing literature—and that they have been compelled to bring more cases in the courts involving their rights, and thereby the rights of all of us, than any other organization in the country.

No amount of persecution impairs the zeal with which Jehovah's Witnesses serve their faith. Persecution of them is not only futile but a reflection upon all those who tolerate it. The degree to which our community accords Jehovah's Witnesses their rights measures our own loyalty to the ideals we profess. Protection of their freedom of speech and conscience is the protection of our own, regardless of whatever attitude we may take to their often annoying public conduct.

Solutions can be found to the conflict between the commands of the State and their concept of duty to God which will not sacrifice any reasonable requirements of the community. It is suggested that their children be excused from flag saluting without impairing patriotic education; their literature could be freely distributed constitutionally without violating the rights of householders or otherwise creating disorder; their men of military age can be exempted from compulsory military service, and given civilian service like conscientious objectors.

It is in the interests of religious tolerance and reasonable solutions that the undersigned—wholly dissociated from any connection with or endorsement of Jehovah's Witnesses—subscribe to the publication of this pamphlet and commend it to the attention of all liberty-loving Americans.

DR. HENRY A. ATKINSON (New York)
BISHOP JAMES CHAMBERLAIN BAKER (California)
HARRY L. BINSSE (New York)
REV. W. RUSSELL BOWIE (New York)
DR. HENRY SLOANE COFFIN (New York)
DR. HENRY HITT CRANE (Detroit)
DR. FREDERICK MAY ELIOT (Boston)
DR. HARRY EMERSON FOSDICK (New York)
DR. JOHN HAYNES HOLMES (New York)
RABBI MORRIS S. LAZARON (Baltimore)
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REV. DR. D. DE SOLA POOL (New York)
RT. REV. MSGR. JOHN A. RYAN (Washington, D.C.)
RABBI ABBA HILLEL SILVER (Cleveland)
DEAN CLARENCE R. SKINNER (Boston)
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I

Organization and Beliefs

THE religious association of Jehovah's Witnesses, who object to the use of the word "sect" to describe them, has expanded from its origin in the United States sixty years ago to many lands. Its international headquarters are the Watchtower Bible and Tract Society with a large plant in Brooklyn, New York. Its membership in the United States is conservatively estimated at half a million persons. Its international membership probably runs into several millions. Its largest affiliations are in Canada, England, Germany, Australia and South Africa. Membership has been growing rapidly in recent years, particularly in English-speaking countries. It has of course been suppressed in all countries under Axis control—and strangely in Canada.

Recruits are secured by the activity of Witnesses in conducting propaganda on the public streets and house to house, by the distribution of literature and the playing of phonograph records. The organization has no clergymen nor churches. A number of special representatives charged with directional field work are "ordained ministers" in the faith of Jehovah. Assisting them are regular full-time "publishers" who devote all their time to preaching the gospel and to organization of "publishing companies," their local units. There are in addition many part-time "publishers."

Contact between members is maintained by two bi-weekly magazines, the *Watchtower* and *Consolation*, and by many books and pamphlets, published in almost incredible numbers reaching a total annual output of over 45,000,000 copies, in twenty-eight languages. Meetings are held in "Kingdom Halls" or in private homes, with regional and national conventions annually. Considerable radio time is also secured. Membership and activities cover the entire country reaching into the smallest communities.

Their Religious Beliefs

THE cardinal principles of Jehovah's Witnesses are described thus in excerpts from their literature.

"Jehovah's Witnesses are not a sect or a religious organization. They are in a class of faithful men mentioned in the

eleventh chapter of Hebrews whose sole purpose is to inform the people of God's purpose to establish a righteous government on earth, and in obedience to God's commandment to warn the people of the impending disaster upon the nations, the Kingdom of Jehovah God under Christ, which Kingdom is the Theocracy.

"There are unseen powers more powerful than man which are responsible for the present march of all nations to destruction. These superhuman powers are the devils, of which Satan is the chief.

"After the final war of Armageddon, God creates the new earth, the new righteous organization, which God will set up for the Government of the survivors of Armageddon and their righteous offspring. That organization will be carried on by the holy men of God of olden times prior to Christ who were faithful witnesses of Jehovah even unto death.

"All true and faithful followers of Jesus Christ are indeed and must be *witnesses* to Jehovah by declaring his name and his Kingdom under Jesus Christ. All such people must preach the Gospel of God's Kingdom in obedience to the Commandments.

"Religion, contrary to its claim of being Christian, has betrayed the peoples right into the powers of the Demons. Thereby religion turns mankind away from God's Kingdom, the Theocracy."

THEIR attitude to God and the State is expressed in the following quotations.

"Loyalty means to be obedient to the law.—Necessarily this means that obedience to God's law and commandments is first, and then obedience to the laws of the state which are not contrary to God's law. (*Rutherford, God and State*)

"All the nations of the present world are against the Theocracy. There are amongst the nations of earth two mighty factions which claim the right to rule and which nations are designated in the prophecy of Daniel as the "king of the north" and the "king of the south" and both of which are against the rule of the world by Jesus Christ,

who is Jehovah's King. The covenant people of God are on His side and entirely devoted to his purpose and therefore must be and *are at all times neutral* in all things of controversy between the nations of the evil world.

"The totalitarian ruling powers, composed of Nazis, Fascists and big religious leaders, now stand where they ought not to stand, claiming the right to rule the world and demanding that Jehovah's covenant people shall hail and bow down to totalitarian rulers, join their armies, fight under their banners, and when Jehovah's covenant people refuse to do so they are imprisoned and many put to death. In the face of all this God's covenant people stand firm on the side of the Theocracy even though they see their faithful ones being imprisoned and sent to death. Although the laws of such nations declare that a minister shall not be required to do military service, the acting authorities who have to do with carrying the law into operation say to these faithful covenant people of God: 'We do not recognize you as a minister, nor that you are a sincere conscientious objector to engaging in war; therefore you must join the fighting forces and fight under our banner.'

"The Faithful covenant people of God answer: 'We cannot do so. We are in covenant with Almighty God to do His will. To obey your commandment we must violate our covenant with God; and if we do so we shall suffer eternal destruction at the hands of the Almighty God. We will willingly conform ourselves to every law of the land that does not cause us to violate our covenant with Jehovah.'" (*Year Book, 1942*)

THE general attitude of Jehovah's Witnesses toward governments is therefore to obey every "righteous" law. Unrighteous laws are those which they are forbidden by their religious belief to obey. They do not commonly vote or serve on juries. Their refusal to salute the flag rests on the Biblical injunction:

"Thou shalt have no other Gods before me. Thou shalt not make unto thee any graven image, or any likeness of anything that is in the heavens above, or that is in the earth beneath, or that is in the water beneath the earth; thou

shalt not bow down thyself to them nor serve them; for I the Lord thy God am a jealous God visiting the iniquity of the fathers upon the children unto the third and fourth generations of them that hate me."

But though unwilling to salute an "image" they are entirely willing to take a pledge of respect and allegiance which they have thus formulated and to stand at attention with hats off:

"I have pledged my unqualified allegiance and devotion to Jehovah the Almighty God and to his Kingdom for which Jesus commands all Christians to pray.

"I respect the flag of the United States and acknowledge it as a symbol of freedom and justice for all. I pledge allegiance and obedience to all the laws of the United States that are consistent with God's law as set forth in the Bible."

ON the issue of military service, Jehovah's Witnesses generally are opposed to participation in wars, reserving only the right to fight in a war for Jehovah. But the conduct of individual members is not controlled by any discipline, and members take varying positions on military service—some accepting combatant or non-combatant posts in the army, more taking service as conscientious objectors, and even more refusing all participation, with consequent imprisonment.

One widespread cause of antagonism to Jehovah's Witnesses is their opposition to other religious bodies on the ground that they pervert the purposes of "Almighty God as expressed in the Bible." Their pamphlets attack the Roman Catholic Church, Protestants, and Jews. They hold that organized religion is a "racket." They have therefore aroused the opposition of strong elements in the churches, as they have the defenders of conventional patriotism in the American Legion. The zeal of the Witnesses inevitably makes them provocative. They are insistent: they push their messages into the hands of passers-by, into the doors of homes, into public places. They are difficult to rebuff or discourage and when driven away come back for more. The behavior of such zealots results in alienating support of their rights and in a general hostility to them as a public nuisance.

Persecution

ALTHOUGH subjected to persecution in peace-time, war intensifies the conflict between the Witnesses and the requirements of law and it heightens popular prejudice. In Canada shortly after the outbreak of war they were declared an illegal association. They may not publish papers, distribute literature, or hold meetings. Some of their leaders who have persisted in so doing have been interned without hearing or trial. In Germany, they have been sent by the hundreds to concentration camps. One special camp reserved for them is said to have over 6,000 inmates. In England, where they enjoy more tolerance than in other parts of the British Commonwealth, over 500 of their members are in prison for refusing military or civilian service. Reports of their difficulties with the law come also from Australia, New Zealand and South Africa.

In the United States the war has brought a conflict with conscription which has resulted in the imprisonment of over 450 Witnesses who have refused either military service or assignment to conscientious objector camps, insisting upon recognition as "ministers." Mob violence, which reached a peak in 1940 following the disasters to the Allied cause in Europe, has continued sporadically, particularly in the Southwest, and with outbreaks in cities where the Witnesses were gathered in convention.

ATTORNEY General Francis Biddle has repeatedly warned against attacks on the Witnesses. In a speech before the National Conference on Social Work, June 2, 1941, he said:

> "We all know of the outrages committed against the members of the sect known as Jehovah's Witnesses, who, with misplaced zeal of martyrs, openly tempt retaliation for their attacks on the Catholic Church, so that grand juries refuse to return indictments. Where state officials should have been active in preventing this cruel persecution, they have in many instances permitted it to occur, and in some have been the leaders of the mob. And this betrayal of the rights of citizens is done in the name of patriotism, and failure to salute the flag is made an excuse to desecrate the principles of which the flag is a symbol. The test of our ability to preserve these principles is always sharper in times of crisis.

Hitler's methods cannot preserve our democracy, which demands justice for all alike."

At the request of the Attorney General, several U.S. District Attorneys have made radio addresses cautioning against attacks on Witnesses and upholding their right to carry on propaganda without hindrance.

The Witnesses are obliged incessantly to contest in the courts the restrictions upon them. They have carried case after case to the United States Supreme Court. Their general counsel, Hayden Covington, is involved in litigation all over the country, either to secure their rights to distribute literature, to contest expulsions from the public schools, or to defend members against criminal charges. Court decisions on the whole have become increasingly favorable to the contentions of Jehovah's Witnesses, as is shown by the record in Section V.

It is a reflection upon progressive forces in American life that the Witnesses have been aided in their many court contests by only a very few agencies, chiefly the American Civil Liberties Union—with incidental help on issues raised in the Supreme Court—in one case, by the American Bar Association, involving the flag-salute, and in a case involving taxation on the sale of literature, by the American Newspaper Publishers Association and the Seventh Day Adventists. Yet the rights which their court contests seek to uphold are rights applicable to all persons; and their success in establishing them has been of immense benefit to the cause of civil liberties generally.

II

Mob Violence

ACTS of violence against Jehovah's Witnesses reached a peak in 1940 in the feeling aroused by the Nazi conquests of Western Europe. The story has been told in substance in a previous A.C.L.U. pamphlet, *The Persecution of Jehovah's Witnesses.* Violence declined during 1941 and 1942 but the attacks though less frequent have been shocking. The war has intensified popular antagonism to their refusal to salute the flag and to participate

in the war. Most of the attacks in the past two years have been in the Southwest with scattered outbreaks in almost every state of the nation, almost always in small communities where prejudice and action are easily organized, and hard to check.

The annual conventions or "Theocratic Assemblies" of the Witnesses in September 1942 were the occasion for violence in several cities. Members were gathered to hear the message of their leader, N. H. Knorr, carried to them by wire from the main convention at Cleveland, Ohio. Knorr's theme was "Peace, Can It Last."

The Cleveland convention went off without trouble thanks to the good sense of the city authorities. 20,000 Witnesses gathered on September 20th, the same day that an army show was being staged in the municipal auditorium. Before and after the meetings at their convention hall, the Witnesses posted themselves at almost every street intersection to sell their literature. Tension grew. A serious situation was averted by Mayor Frank Lausche who in public announcements upholding freedom of speech and assemblage, urged the townspeople not to provoke violence. He also announced he would not appear before the convention as he had been scheduled to do and urged citizens to give their attention to the army show.

But in Little Rock, Arkansas, and Klamath Falls, Oregon, serious outbreaks occurred against members gathered in the local conventions.

Little Rock, Arkansas

A NEWSPAPER report in the Arkansas Gazette of September 20th, describes the violence at Little Rock:

"Seven members of the religious cult known as Jehovah's Witnesses were injured, including two who were shot in a fierce and bloody battle at the former Brinkley Hospital last night.

"Workers of Stretch 3 of the War Emergency Pipeline attempted to drive the Witnesses from their quarters in the former hospital building. The battle started when about 100 of the pipeline workers armed with guns, sticks, black-jacks

and pipe swarmed into the hospital grounds about 8 p.m. The khaki-clad workers still covered with dust from their day's labors, met with resistance soon after they entered the gate.

"About 10 Jehovah's Witnesses blocked the road about 150 yards from the highway and the trouble started when the angered pipeliners started through. Six or seven shots were fired during the struggle which lasted five minutes. After the fight, the Witnesses fell back toward the hospital and into the woods. Meanwhile other Witnesses coming from the city in cars were attacked as they turned from the highway into the road leading from the hospital. The pipeliners at the gate ordered them from their cars or dragged them out. They were attacked and beaten over the head.

"Asked if they would salute the flag, many refused to answer. One begged for mercy and finally broke away and tried to flee. He was captured before he had gone far. A woman seated in a parked car across the highway, screamed encouragement to the attackers, as he was being pursued. A husky Little Rock youth, about 19, a spectator, turned pale as he watched the beating.

"Occasionally another automobile would turn into the grounds. A dozen or more pipe-liners pounced on each car and asked: 'Are you a Witness?' The usual answer came back in a firm voice, 'Yes I am a Witness.' The driver and male occupants were then dragged out and the pummeling began. Many used their fists, but others wielded clubs, long heavy screw drivers, and others black-jacks. The beating continued until the victim fell.

"One victim was seated on the running board of an automobile after he had been beaten, but a group of men surrounding him prevented the reporter from seeing what had happened. The spokesman demanded that the Witness salute the flag. Apparently he complied. He then was tossed into a ditch with three other prostrate forms. These four remained in the ditch when the reporter left."

The Department of Justice was urged by the Witnesses to investigate and act, but no results have yet appeared, possibly due to lack of a federal question.

Klamath Falls, Oregon

AT Klamath Falls, over 1,500 men, women and children were gathered in their convention hall. Outside, according to affidavits, a quickly growing mob, which reached 1,000 at its height, attempted to break into the meeting, and subjected many of the Witnesses to physical violence. Stones and stink-bombs were thrown in through the windows, literature was burned, property destroyed, and hundreds of automobiles belonging to the Witnesses were disabled. The local police were unable to cope with the situation. Only militia called out promptly by Governor Sprague were able to restore order.

Excerpts from an affidavit dated Sept. 24, by Edna F. Rogers of Medford, Oregon, state:

"At one o'clock when Brother Knorr came on, everyone was inside the hall ready for his speech "Peace—Can It Last." The front section or lobby where the literature was kept, had been arranged with chairs for women with children under five years. It was pretty well filled and the main hall also. Soon we heard an American Legion band outside the hall. Then we heard the American Legion had put up a bond-selling booth across the street and were yelling 'Come on out and buy bonds—why don't you help fight this war.' Then they went through a flag-salute ceremony and called on us to join them. A few minutes after that things began to happen—all of a sudden a stone came through a large plate glass window. I was sitting with the children and as the door slid open, we could see fists flying as well as clubs. Then the lecture stopped which meant the enemy had cut the wires.

"Brother Davis took the lecture just where Brother Knorr left off, and tried quieting everybody by telling them everything was alright. Soon our men returned and I could see they had been in a fight as some of their faces and hands were cut and bleeding.

"The crowd outside was getting uglier and uglier. So they were pitching, rocks, stink-bombs, and bottles containing ammonia and acid. Our men proceeded to break up

benches and as soon as a window was broken, they would place parts of the benches in the openings to keep out tear gas and stink bombs. They had to stand there with clubs made out of the benches to hit those who tried to climb through the broken windows. One of their crowd got hurt at one of the doors and our men at great risk to themselves opened the door and dragged him inside, for if they left him outside he would be trampled to death. Things were in turmoil, children crying and women in hysterics.

"Later a Marine Sergeant came inside bringing a local reporter with him. He said he'd rather fight on our side as from the looks of things the Witnesses were good clean fighters. He stayed with us until the state militia arrived. While he was inside the mob threw in a box full of burning kerosene rags. The brethren soon threw them out. Then they broke all the plate glass windows in the front, taking some literature from the shelves. The police told them that if they'd come in a second time, they'd use real bullets on them. They did have quite a pile of literature on the street already setting it on fire.

"Then the brother announced that the militia had arrived. We were permitted to leave and they had a cordon of deputies around the building and for a few blocks around.

"On reaching the parking lot, we saw more destruction. As far as we could see, every Jehovah's Witness car was overturned. And here were some of the cars with tires missing, stolen, or cut. The cars they couldn't turn over, they had rammed the engines with holes, pulling out connecting wires and distributors."

The A.C.L.U. at once urged the Department of Justice to investigate, with the result that the U.S. Attorney at Portland replied that investigation failed to disclose a ground for federal intervention. The Union posted a reward of $500 for information leading to the arrest and conviction of any members of the mob, so far without results.

Volunteer Firemen Lead Mob

AMONG hundreds of affidavits received by the American Civil Liberties Union, scores attest to the fact that local law enforcement authorities and public employees are members, and in many instances leaders of the mobs. Following is an account of an attack that took place in Imperial, Pa., on July 11, 1942, from an affidavit by V. Flandin of Pittsburgh, Pa., dated July 22.

"On Saturday, July 11, 1942, I was engaged in the act of preaching the Gospel by means of street corner magazine work. At about 8:15, the fire-siren blew three times. Then I saw five men coming toward me leading a mob. Before I knew it, they were beating me up. My shirt was torn off my back along with the magazine bag. I was pushed against a building and thrown to the ground, where I was kicked in the ribs and chest while another one twisted my leg tearing a ligament in my knee. While I was still there, Walter Moschiwsky, William Comodor, and William Torso came over to help me. By this time two hundred or more gathered beating up all of us. I managed to get on my feet and together with Walter Moschiwsky, we headed for the outskirts of town which was very difficult in view of what they did to my leg. As we went we were being kicked in the rear. On the way I saw one of the mobsters hit Joseph Vruck, 54 years old, with his glasses on knocking him to the ground. I also saw one of the men hit Charles Meng while he was sitting in his car. They dragged him from his car and beat him."

(The affidavit continues to tell how the several Witnesses attempted to get out of town in their cars. The narrative is picked up here with the affidavit of William Torso, of McKees Rock, Pa.)

"Walter Vruck rode with me out of Imperial going east on route 22-30. The mob noticed my car and they immediately jumped into their cars, and into a fire truck, with the fire chief, Frank Meacci driving. They followed us.

"As we came to Hood's tavern, I noticed Walter Moschiwsky, G. Flick, Joseph Vruck and John Leroy standing there. I pulled up to let them in my car. As they got in, the fire-

truck and the rest of the mob were on top of us. The fire-truck had their red-flashing spot-light going on and off. I wound up my windows and locked the door. The mob broke the windows with a fire axe. They opened the door and dragged me out. Vruck and Le Roy managed to get away by running into the woods. Flick ran across the lot. The mob chased him, caught him, and smashed his nose, and cut his lip, and put a lump on the side of his temple. They lined us all up and started to beat us. They grabbed Moschiwsky, put him up against a flag-pole and hit him, telling him to salute the flag. Then they took us over to the flag pole and wanted us all to salute it.

"The mobsters did not know exactly what to do with us. The final decision was, 'let's take them back to Imperial and hang them.' They then kidnapped us, loaded us on the fire-truck and started back through a side road with 15 cars following. Half-way there, the Motor Police came by, and stopped the truck and rescued us."

Efforts by the Jehovah's Witnesses to obtain prosecution of the assailants failed.

"Constitution Don't Apply Here"

AN affidavit by J. E. Lowe of Columbus, Ohio dated March 25, 1942 tells of violence that occurred in West Jefferson, Ohio on March 21.

"Previous events leading up to this will show that this mob violence had the blessing of Officer Lonnie Wolf and Mayor Stone of West Jefferson. On March 7th, Officer Wolfe took several Witnesses who were preaching the gospel on the street corners by displaying the Watchtower and Consolation magazine, to the Mayor's office. They were held there for an hour and a half without any charge being preferred against them, during which time Mayor Stone was trying to find some ordinance which he could use against them. He told them he would charge them with contributing to the delinquency of their children, keeping them out after

9 o'clock. (The Witnesses were finished with their work at 7 p.m. when apprehended.) When reminded that the Supreme Court had ruled in our favor, Wolfe replied 'We don't care for the Supreme Court and the Constitution don't apply here.'

"On March 12, another Witness and myself called at Mayor Stone's office. He ordered us out of his office and slammed the door. On March 14th, the Witnesses returned to West Jefferson. Mayor Stone said he would arrest us as soon as he could find Officer Wolfe.

"On March 21 three car-loads of Witnesses returned to West Jefferson. Officer Wolfe was seen going in and out of different places where men generally hang out in small towns. Then the town siren blew. A crowd of men gathered in front of the barber shop immediately began pushing the Witnesses and striking them. The five male members tried vainly to protect themselves and their wives and children, but were so greatly outnumbered that it was impossible. In their viciousness they hit women members and knocked them down, one of them unconscious, and blacked their eyes. They were reminded that they were fighting against Christians and taking the law into their own hands. They replied 'That's exactly what we're doing—taking the law into our own hands.'

"They started on us again. The Witnesses' faces were already bloody. Someone hit me with a blunt instrument. Everything went black. While in this condition, they continued to strike my head and face cutting another gash in the top of my head. At the same time they had dragged three of the Witnesses out on the highway and were pounding, beating and kicking them. Such shouts as 'Kill them,' 'Tar and feather them,' 'Make them salute the flag,' came from all directions. And, all this time, Officer Wolfe sat in the barber shop and watched.

'Finally this gory indescribably vicious assault ceased. The Witnesses locked arms and started to walk toward their car at the far end of town. One tall young, blond fellow procured a huge American flag, held it high over our heads

and marched with us. The same noble flag-bearer had only a few minutes ago twisted the arms of a young girl Witness behind her back until she thought they would break. The mobsters were at our heels singing 'My country tis of thee sweet land of liberty,' and shouting, 'Make them salute the flag.' "

Protests were lodged with the Department of Justice against the local law enforcement authorities, but no prosecution has been brought.

Efforts to Combat Violence

IN an effort to inspire prosecution of those participating in such attacks, the A.C.L.U. has recently offered public rewards of $500 on five different occasions; in three Texas towns, at London, Ohio, and at Klamath Falls, Oregon.

The effect of these award offers has generally been to restrain further outbreaks in the particular town. But they have not resulted in getting information against the offenders. A letter from Curtis A. Smith of London, Ohio, illustrates the reason for this: "I have obtained names of various individuals that committed this crime, and have found out the names of several eye witnesses, but they are afraid to turn over their names to you."

In numerous instances, the Witnesses and not the attackers have been arrested on one pretext or another. They have found it very difficult to retain counsel in their defense, "because of fear to represent the brethren at any price." Deprived of counsel, they have often successfully acted as their own attorneys, guided by instructions on court procedure and legal argument in pamphlets issued by their organization.

It is also their practice to send affidavits to the Civil Rights Section of the Justice Department after each instance of violence. Investigations are promptly and searchingly made but in only a few cases is a federal issue found. Even so, grand juries often refuse to indict. In only one instance has a prosecution and conviction resulted. A federal prosecutor succeeded in May 1942 in ob-

taining the conviction of two local law enforcement officers in the U.S. District Court at Charleston, West Virginia. These officers, a police chief and a deputy sheriff of Nicholas County, West Va., were found guilty of failing in 1941 to protect the civil rights of a group of Witnesses and wrongfully detaining these Witnesses in the Richwood City Hall, tying them with ropes, making them drink large quantities of castor oil, and leading them out of town at the end of a rope. An appeal from this conviction was taken to the Circuit Court of Appeals in October 1942.

The efforts of the Department of Justice, and the pronouncements of the Attorney General and his instructions to district attorneys have contributed greatly to declining violence. Some of the decline is to be attributed also to the restrictions on the mobility of propagandists by gasoline rationing.

III

The Distribution of Literature

IN two notable cases the United States Supreme Court has sustained the right of Jehovah's Witnesses, and thereby of all others, to distribute literature freely in public places, to canvass house-to-house, and to play phonograph records when objection is not made.

Cantwell v. Connecticut put these rights on firm foundations. An appeal had been taken by Newton Cantwell and his two sons from a decision of the state supreme court upholding their conviction on two charges—solicitation of funds for religious purposes without approval of the secretary of the welfare council, and playing records attacking the Catholic Church, which, it was charged, would incite others to a breach of the peace.

In reversing the conviction on both counts, the Supreme Court said in an opinion delivered by Mr. Justice Roberts on May 20, 1940, that:

> "We hold that the statute (regarding solicitation) as construed and applied to the appellants deprives them of their

liberty without due process of law in contravention of the 14th Amendment. The first Amendment declares that Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof. The 14th Amendment has rendered the legislatures of the states as incompetent as Congress to enact such laws.

"It will be noted that the Act requires an application to the secretary of the public welfare council, who is authorized to withhold his approval if he determines that the cause is not a religious one. Such a censorship of religion is a denial of the liberty protected by the 1st Amendment and included in the liberty which is within the protection of the 14th Amendment."

Right to Play Records

IN regard to playing records, the Court said:

"When clear and present danger of riot, disorder, interference with traffic upon the public streets, or other immediate threat to public safety appears, the power of the state to prevent or punish is obvious. Equally obvious is it that a state may not unduly suppress free communication of views, religious or other under the guise of conserving desirable conditions.

"Having these considerations in mind, we note that Jesse Cantwell was upon a public street where he had the right to be, and where he had a right peacefully to impart his views to others. He requested of two pedestrians permission to play them a phonograph record. The permission was granted. It is plain that he wished only to interest them in his propaganda. The sound of the phonograph is not shown to have disturbed residents of the street, to have drawn a crowd, or to have impeded traffic. Thus far he has invaded no right or interest of the public or of the men accosted. The record played by Cantwell embodies an attack on all organized religious systems. The hearers were in fact highly offended. One of them said he felt like hitting Cantwell.—Cantwell's conduct, considered apart from the effect of his

communication upon the hearers, did not amount to a breach of the peace.—We find in the instant case no assault or threatening of bodily harm, no truculent bearing, no personal abuse. On the contrary we find only an effort to persuade a willing listener to buy a book, or contribute money in the interest of what Cantwell, however misguided others may think him, conceived to be true religion."

To License is to Censor

LOVELL v. City of Griffin (Georgia) was an appeal from the decision of the Court of Appeals of Georgia, upholding a conviction for violating a city ordinance prohibiting the circulation of literature of any kind without first obtaining permission from the City Manager.

In reversing this conviction, the Supreme Court said in an opinion handed down in March 1938 by Chief Justice Hughes:

"We think that the ordinance is invalid on its face. Whatever the motive which induced its adoption, its character is such that it strikes at the very foundation of the freedom of the press by subjecting it to license and censorship. The struggle for the freedom of the press was primarily directed against the power of the licensor. The liberty of the press became initially a right to publish without a license what formerly could be published only with one! While this freedom from previous restraint upon publication cannot be regarded as exhausting the guaranty of liberty, the prevention of that restraint was a leading purpose in the adoption of the constitutional provision."

Sale of Literature

BUT these decisions, favorable as they were, did not settle the issue. For Jehovah's Witnesses not only distributed literature free but also asked for contributions to pay for its cost. Sometimes they made actual sales, withholding distribution if it was not paid for. This resulted, after the Supreme Court deci-

sion, in the passage of ordinances in many cities taxing the sales of literature in public places or in jailing Witnesses under peddling ordinances. Contests of these ordinances and arrests resulted in varying decisions, some courts refusing to recognize the claim of officials that they were peddlers, other courts sustaining that contention.

The whole issue came before the Supreme Court in cases joined from Opelika, Alabama; Fort Smith, Arkansas; and the State of Arizona. The Court decided the issue in June 1942 by a 5 to 4 decision, sustaining the right of cities to tax the sale of any literature. The majority opinion delivered by Mr. Justice Reed said:

"When proponents of religious or social theories use the ordinary commercial methods of sales of articles to raise propaganda funds, it is a natural and proper exercise of the power of the state to charge reasonable fees for the privilege of canvassing. Careful as we may and should be to protect the freedoms safeguarded by the Bill of Rights, it is difficult to see in such enactments a shadow of prohibition of the exercise of religion or of abridgement of the freedom of speech or the press."

THE minority opinion, delivered by Chief Justice Stone, said:

"It seems fairly obvious that if the present taxes, laid in small communities upon peripatetic religious propagandists are to be sustained, a way has been found for the effective suppression of freedom of speech and press and religion despite constitutional guaranties. The very taxes now before us are better adapted to that end than were the stamp taxes which so successfully curtailed the dissemination of ideas by 18th Century newspapers and pamphleteers and which were a moving cause of the revolution."

The court went even further, by implication at least, in refusing in October 1942 to review the convictions of three members of Jehovah's Witnesses for violation of a local ordinance in Florenville, Texas, prohibiting altogether the sale of literature

on the streets. The convictions had been upheld by the Texas Supreme Court. Arrangements are being made by counsel for Jehovah's Witnesses to bring the cases again before the Supreme Court.

Petition for Rehearing

AN effort is also being made to get the Court to re-hear the case decided in June by a majority of one. The application for a re-hearing was supported not only by the American Civil Liberties Union, which appeared in the original case, but by the American Newspaper Publishers Association and the Seventh Day Adventists.

In the application for a rehearing the brief for the Jehovah's Witnesses, signed by Hayden Covington, said:

"The majority Supreme Court opinion says: 'So the mind and spirit of men remain forever free, while his actions rest subject to necessary accommodation to the competing need of his fellows.' This is a new theory grafted on to the Constitution and the law. According to precedent, the only time acts involving freedom of conscience are subject to restriction is when the act presents a clear and present danger to the nation and to the property rights of others; or is contrary to morals, or that public peace will be invaded.

" 'The mind and spirit of man remain forever free' says the Court. But he still needs a license! His mind and spirit are free so long as he sits on a porch, or is sound asleep in bed. If his mind and spirit move him to get up and go somewhere in the interest of others, there freedom ends and he must have a license. The Court has ruled that if you don't use your mind, none may interfere with you. If you do, they may.

"The fee 'for use of the public streets for business purposes' is proper for use beyond the common right. But it has no valid bearing on the common right or use, more especially free speech, free press, and worship of Almighty God.

"Under guise of securing public order, decorum and free movement of traffic, public expression is suppressed. Taxed

speech is not free speech. It is silence for persons unable to pay the tax. Nor is taxed distribution of literature a free press. Nor is taxed dissemination of Bible literature freedom of worship."

Entire Press Endangered

THE brief of the American Newspaper Publishers Association signed by Elisha Hanson saw in the court's decision an attack against freedom of all the press and said:

"The hazards to which the press may be exposed as a result of upholding of the license taxes in the instant cases are readily perceived. If the legislature can require a license as a condition precedent to the circulation of press information, it can impose an identical license as a condition to engaging in the newspaper publishing business.—If the state has such power, it may make the conditions of the license whatever it wills, to the extent for instance that only a few newspapers can perform the functions of the press, or even to such an extent that none can perform the functions at all."

Threat to Speech, Press, Religion

THE brief for the American Civil Liberties Union signed by Osmond K. Fraenkel charged that the "decision of the majority has greatly curtailed the constitutional protection of freedom of speech, of the press and of religion." The brief continued:

"That the decision of the Court will have far reaching and disastrous consequences can hardly be denied. While the amounts of the taxes were not challenged in the particular cases before the court, in the belief that no such challenge was necessary in view of the nature of the ordinances, it can hardly be denied that the amounts are substantial and burdensome. If the opinion of the court stands, then all unpopular minority groups will be confronted with the necessity of challenging, in each instance, the reasonableness of the amount of the license fee exacted by each particular municipality. Until a number of such cases shall have

reached the Court no one will know what standard will be applied. The litigation which will ensue will necessarily create a tremendous burden on all such groups. It may indeed by itself result in a practical denial of freedom of distribution.

"It is evident that ordinances of this kind lend themselves to discrimination in enforcement. So long as they are confined to purely commercial enterprises, there is little likelihood of discrimination—or at least it can be taken care of in ordinary ways. However, when such licenses can be imposed on persons exercising political or religious functions, then it is practically certain that such discrimination will result, that unpopular groups will be harrassed for not having paid the tax and popular ones never required to pay it. The burden will then be imposed upon the representatives of these unpopular groups to prove this discrimination, a burden difficult to sustain.

"Finally, the decision rendered opens wide the door to the harrassing of unpopular groups by dubious testimony. If these groups now abandon their previous habit of requesting contributions in connection with distribution of literature, it is safe to predict that their representatives will be arrested throughout the country on the charge that they did request such a contribution. In the vital field of freedom of ideas, no such consequence should be possible."

Missionary Method Jeopardized

A RELIGIOUS denomination affected directly by the court's decision, is the Seventh-Day Adventists whose system of proselytizing through literature distributors known as "colporteur evangelists" is very similar to that employed by the Jehovah's Witnesses. A brief filed for this denomination by Homer Cummings, former U.S. Attorney General said:

"It is not too much to say that the cumulative result may be the ultimate destruction of the Denomination; and it must necessarily curb drastically the missionary method it has

developed in the United States without official hindrance for a century.

"The colporteur system is a religious rite, a method of carrying the Gospel to otherwise inaccessible places. Yet the court by its decision denies the right to spread the Gospel except to those of substance. The denial of the only practical method to carry on this religious work is a denial of the right itself."

The Press in Opposition

THE reaction of the press to the court's decision was one of widespread opposition. Such national magazines as Colliers, Newsweek, and Time were among those expressing dissatisfaction. No less outspoken were the daily newspapers, among them, the New York Times, New York Daily News, New York Post, Chicago Tribune, Chicago Daily News, Washington Post, St. Louis Post Dispatch, Detroit News, Atlanta Journal, Lexington Leader, and Richmond Times-Dispatch.

Even the religious journals, organs of denominations which the Jehovah's Witnesses have continuously berated, came out in protest. Included among them were, the Tablet (New York, Catholic), the Commonweal (New York, Catholic), Presbyterian Guardian (Phila.), Watchman Examiner (New York, Baptist), Christian Advocate (Chicago, Methodist), Christian Century (Chicago, undenominational).

IV

The Court Cases Against Them

Sedition and Other Offenses

JEHOVAH'S WITNESSES have had to meet in the courts all over the country a host of charges ranging from vagrancy to sedition. While convictions have been obtained in the lower courts, no higher court has yet sustained any conviction for car-

rying on the organization's activities. Yet scores of Jehovah's Witnesses have been obliged, while the higher courts were deliberating, to serve short sentences in prison.

Early in 1942, the Mississippi legislature passed a law penalizing "doctrines and teachings detrimental to the public safety," and making it an offense punishable by confinement to the penitentiary for the duration of the war to "encourage by speech or in print disloyalty to the government, or to create an attitude of refusal to salute the flag."

Scores of arrests have already been made under this law. The first test case was argued in the Lee County Circuit Court of Mississippi in May 1942. The defendants, Otto Mills and his wife Roxie, were convicted for distributing a booklet written by the late Judge Rutherford setting forth the reasons why Jehovah's Witnesses cannot salute the flag.

Building Up Prejudice

AN examination of the testimony in this case reveals that the jury convicted the defendants not for distributing seditious literature under the indictment, but for their refusal to salute the flag and fight for their country. Excerpts from the examination of Mills by the prosecuting attorney Coleman:

Q. Mr. Mills, you said a while ago that you would not take up arms in defense of your country, neither would you salute the American flag, is that correct?

A. Yes, sir.

Q. Mr. Mills, suppose the United States Army was coming down the streets of Tupelo, to defend your home, and you were standing on the sidewalk when the American Flag passed, you tell this court that you would not honor that flag to the extent of saluting it?

A. I would not.

Q. You have been teaching others not to salute the flag, haven't you?

A. I have not.

Q. Now your counsel asked you what your position was in this war, and you say you are neutral.

A. That's right.

Q. You mean you are going to stay here and are going to get all the advantages the Government gives you, but you want the other man to do your fighting—then you are just not a fighting man when it comes to defending your home, or your wife, or your baby or your country?

A. If the American people took the stand I am taking, they would not have to fight. Jehovah God would do your fighting.—I can give you instances from the Bible where the Lord God Jehovah fought for the children of Israel and the people did not have to hit a lick in their own defense.

Q. Those were miracles God performed.

A. God can still perform miracles.

Q. Yes but He don't do it very much.

An appeal from the conviction is pending before the Mississippi Supreme Court. The American Civil Liberties Union filed a brief as friend of the court charging that the statute denied freedom of worship, speech and press and that the conviction was the result of prejudice against the defendants' religious views.

Louisiana followed by adopting a law similar to the Mississippi law. No test case under it has yet been reported.

Criminal Syndicalism, Riotous Conspiracy

CRIMINAL syndicalism, a charge designed for radicals, was the basis for indictment of seventy-five Jehovah's Witnesses at Connersville, Indiana in 1941. The prosecution considered it advocacy of the overthrow of the existing government to preach "Theocratic Government by Jehovah," a basic belief of the association. The Fayette County circuit court, though as yet refusing to act on a motion to dismiss the charges, released bail for the defendants and the case is therefore virtually dead.

In the same town, a year earlier, two women, one aged seventy and the other over fifty were tried for riotous conspiracy. They

were found guilty and sentenced to two to ten years in Indiana State Prison. Although an appeal was taken, the women were not released on bond until several months later. The state supreme court finally reversed the conviction and freed the defendants.

In Harlan County, Kentucky, in June 1940, six members of the Jehovah's Witnesses were arrested under the state sedition act on the ground that they advocated another form of government, "theocracy." They were held in jail for weeks, being finally released when their counsel applied for an injunction before a three-judge federal court to prevent the trial. The court ordered the Witnesses freed and advised the state's attorney to notify prosecutors throughout the state not to invoke the sedition statute against members of the association. The order, in the form of an injunction, also prohibited intimidation or threat against Witnesses.

In general, the rights of Jehovah's Witnesses have been sustained against prosecutions when appeal has been taken either to the higher courts or to the federal courts. The lower courts—both officials and juries—reflect current prejudice too strongly to do justice. Only determined and organized resistance by Jehovah's Witnesses and the skill with which they conduct their litigation, have secured the degree of freedom they enjoy.

V

Flag Saluting in the Public Schools

OF all the activities of Jehovah's Witnesses to attract public attention, and the first to raise the issue in the courts, was the refusal of school children to salute the flag. Their refusal has been handled by sharply differing tactics. In the larger communities the issue has hardly arisen because school officials commonly permit the children of Jehovah's Witnesses to remain sitting, or to stand silently while the rest of the children go through the patriotic exercises; or they are excused altogether from attendance at them.

But in the smaller communities, where pressures for conformity are stronger, most school boards have responded by expelling

the children altogether. Parents then made provision for private instruction; or where numerous expulsions occurred, Jehovah's Witnesses organized special schools of their own. In some states, expulsions were followed up by prosecutions of parents for refusing to send their children to school or for contributing to their delinquency. In a few states children themselves were haled to court as delinquents, and ordered to state training schools. All these prosecutions have so far failed to stick on appeal, with the sole exception of the Supreme Court of Arizona which recently sustained a conviction of parents. A review by the U.S. Supreme Court is being sought.

The New Jersey Supreme Court last June ruled that parents cannot be penalized if their children are expelled from school for not saluting the flag out of religious reasons, and set aside the fines imposed on parents of expelled children.

In Massachusetts the State Supreme Court in August 1941 reversed the decision of a lower court which upheld the commitment to reform school of three children as "habitual school offenders." The children were first expelled by the school authorities for refusal to salute the flag, and then charged with being "offenders" because of their enforced absence.

The New Hampshire Supreme Court in May 1941 voided reform school sentences imposed on children who were charged with "delinquency" after being expelled from school for refusal to salute the flag. In scouting the charge of "delinquency," the court held that the exercise of religious scruples by the children "is not tinged with immorality or marked by damage to the rights of others."

The ACLU filed briefs as friend of the court in most of the flag salute cases.

It is estimated that several thousand children have been expelled in the last five years and have been forced to receive very inferior instruction for the sake of conscience.

Supreme Court Decision

THE flag saluting issue which arose in so many communities was finally carried to the United States Supreme Court, which in June 1940 rendered a decision in the case of *Minersville*

v. Gobitis with Justice Harlan F. Stone alone dissenting, sustaining the right of school boards to require flag saluting as a condition of school attendance. The effect of the decision was not only to confirm the expulsions but greatly to extend them.

Thus the issue remained settled, as everybody thought, until June 1942 when an unprecedented postscript was added to the decision in the literature sales tax case (*Opelika*) by three of the judges who "confessed error." They said:

> "The opinion of the court sanctions a device which in our opinion suppresses or tends to suppress the free exercise of a religion practised by a minority group. This is but another step in the direction which *Minersville v. Gobitis* took against the same religious minority and is a logical extension of the principles upon which that decision rested. Since we joined in the opinion in the Gobitis case, we think this is an appropriate occasion to state that we now believe that it was also wrongly decided. Certainly our democratic form of government functioning under the historic Bill of Rights has a high responsibility to accommodate itself to the religious views of minorities, however unpopular and unorthodox those views may be. The first amendment does not put the right freely to exercise religion in a subordinate position. We fear however that the opinions in this and in the Gobitis case do exactly that."

Congress Acts

AT almost the same time Congress passed an act sponsored by the American Legion regarding the use of and respect due the flag, in which it was provided that *full respect for the flag may be shown by civilians when the pledge is given by merely standing at attention.*

An interpretation issued in July 1942, by the Civil Rights Section of the Justice Department said that this law "lays down a Federal standard with regard to a matter which is primarily a concern of the national government and there is therefore a very real question whether any local regulation, ordinance or statute prescribing a different measure of respect to the flag can be en-

forced: for example, flag salute regulations of local school boards such as the Supreme Court upheld in *Minersville v. Gobitis.*"

U.S. Attorneys were instructed to bring this law to the attention of local authorities, requesting the authorities to "conform their policies to the Congressional standards."

Refuse to Follow Supreme Court

TAKING a cue from the "confession of error" of the Supreme Court judges, a three-judge District Court in West Virginia in October 1942 voided a state law requiring the flag salute, saying:

"Ordinarily we would feel constrained to follow an unreversed decision of the Supreme Court of the United States, whether we agreed with it or not.—The developments with regard to the *Gobitis* case however, are such that we do not feel that it is incumbent upon us to accept it as binding authority. Of the seven justices now members of the Supreme Court who participated in that decision, four have given public expression to the view that it is unsound, the present chief justice in his dissenting opinion therein and three other justices in a dissenting opinion in *Jones v. City of Opelika.*

"Under such circumstances, and believing as we do that the flag salute here required is violative of religious liberty when required of persons holding the religious views of plaintiffs, we feel that we would be recreant to our duty as judges if through a blind following of a decision which the Supreme Court itself has thus impaired as an authority, we should deny protection to rights which we regard as among the most sacred of those protected by constitutional guaranties."

Shortly thereafter, the state announced its intention of appealing this decision to the U.S. Supreme Court, which will thus be faced with the reconsideration of its decision in the *Gobitis* case.

The Kansas Supreme Court alone among the state courts has voided a flag-salute statute. In doing so the Court said in July 1942:

"The general theory of our educational system is that every child in the state without regard to race, creed or wealth, shall have the facilities for a free education. In the 34 years since the (school) statute was enacted, no school board, county or state superintendent of public instruction ever acted on the theory that failure of the child to salute the flag, where such failure was based on sincere religious beliefs of the child or his parents would require or justify the expelling of the child from school. We think the statute was never designed to be so construed, and if so, to that extent would be void as being in violation of Section 7 of our (state) Bill of Rights.

"We are not impressed with the suggestion that the religious beliefs of the appellants and their children are unreasonable. Perhaps the tenets of many religious sects or denominations would be called reasonable or unreasonable depending upon who is speaking. It is enough to know that in fact their beliefs are sincerely religious, and that is conceded by appellee. Their beliefs are formed from the study of the Bible and are not of a kind which prevent them from being good, industrious, home-loving, law-abiding citizens."

The result of the long litigation shows conclusively that no criminal penalties will be maintained against parents or children for refusing to salute the flag. Expulsion from school is the only penalty; and even that the courts are beginning to hold void. It is conceivable that the U.S. Supreme Court in the pending case will reverse its position upholding the right to expel—and that thus, the common sense practice of tolerance prevalent in the larger school systems will be constitutionally guaranteed everywhere.

VI

Military Service

JEHOVAH'S WITNESSES do not regard themselves as pacifists or as conscientious objectors to all war. They would fight for Jehovah. They take the position that "their personal covenant to carry out Jehovah's work of witnessing at this time precludes

them from taking up carnal weapons." They commonly regard themselves rather as ministers whose work forbids them to engage in military service, and they demand exemption from all requirements, the same as others claiming to be ministers of God.

The fact that they are not ministers in the accepted sense, following a full-time occupation for which compensation is paid, has made the adjustment of their claims difficult. An agreement was reached between members of Jehovah's Witnesses and Selective Service by which persons qualified by the Witnesses as full-time servants and listed with Selective Service would be given the status of ministers. But the great majority of Jehovah's Witnesses are not full-time servants and earn their livings in other ways. Yet they have commonly demanded the same exemption. Local boards may so recognize them, if they will, but few have done so.

The result, therefore, is that Jehovah's Witnesses not on the list of full-time servants and yet claiming to be ministers have been classified variously by local boards, either for active military service, non-combatant service or as conscientious objectors. Recently the furnishing of lists of full-time servants has been dropped and discretion left wholly to the local draft boards.

The Witnesses commonly reject any form of compulsory service even in a civilian camp for conscientious objectors. When notice of induction comes, a large number of them have refused to respond and are therefore prosecuted. Over four hundred and fifty were in prison by November, 1942 serving sentences up to five years—by far the greatest number of any one religious organization to be sentenced.

In prison most of them have refused to accept paroles to conscientious objector camps. Only about 100 of them have done so. Suggestions are being considered for solving the impasse by getting them out of prison and into useful work in prison camps similar to the work done in Civilian Public Service Camps.

VII

Expulsion from Jobs

SHORTLY after the declaration of war by the United States, instances were reported of expulsions from their jobs of Jehovah's Witnesses for refusal to salute the flag. The following

four typical expulsions took place in one month—December 1941.

Seven Jehovah's Witnesses were dismissed by the Pittsburgh Plate Glass Co. in West Va., five of them having worked there for 5 to 18 years. All were members of the Window Glass Cutters League, AFL, which has a closed shop contract with the firm. This organization at a business meeting defeated a resolution that "we are not willing to work with any persons refusing to salute the Stars and Stripes." However, CIO truckers refused to cart glass. The firm fired the seven in order "not to interfere with production." In November 1942, they were ordered reinstated with full seniority by the Fair Employment Practice Committee and the unions were ordered to control their members against molesting the reinstated men. The case was brought to the attention of the F.E.P.C. by the A.C.L.U.

A postal clerk in Turlock, California was dismissed after complaints from American Legionnaires against his refusal to salute the flag. The Legionnaires wrote to Congressman Bertrand Gerhart of California demanding his dismissal, and complained to postal authorities that they did not want to be served by a postal clerk to whose doctrines they objected and who was obtaining his livelihood from a government whose flag he refused to salute. All efforts to secure his reinstatement have been unsuccessful.

Two employees of the Hatfield Wire and Cable Co., Hillside, N. J., were dismissed because other employees said they would not work if the Jehovah's Witnesses stayed on the job. This action was approved by the plant organization of the United Electrical Radio and Machine Workers of America (District 4, CIO).

One employee was dismissed by S. W. Gas and Electric Co. at Shreveport, La. He was a member of Local 329, International Brotherhood of Electrical Workers.

In one case, there was no dismissal by the employer, but mob action by employees prevented Jehovah's Witnesses from coming to work. Since they were still on the payroll, and had "willingly absented themselves" from work, they were denied unemployment insurance benefits. Their troubles are set forth in the affidavit of Betty Kaspar and Edna Appar of Hammond, Indiana, July 28, 1942:

> "On Friday, July 24, there was a flag ceremony in the Salvage Dept. at which we were not present, because we

were called to the Assistant Sup. office for no other reason than to keep us away from the ceremony to avoid any trouble. We planned to be present at the ceremony and stand in respect of the flag as it stands as an emblem of freedom and justice for all. At quitting time of the same day a mob of 50 women asembled to 'kick us out.' We managed to stay in the plant for our own protection but had to call the Indiana Harbor police to get us home safely. The workers have since then formed a picket line every morning to prevent us from returning to work, with the threat of tearing our clothes and rendering a beating."

How many such cases there are is difficult to say for most are unreported. It is encouraging that the F.E.P.C. has taken jurisdiction in one case and for the first time in history put the power of the federal government against discrimination in employment because of religious prejudice.

VIII

How to Help

ALL friends of civil liberty can assist in combatting attacks on the rights of Jehovah's Witnesses as follows:

1. In cases of threatened expulsion from school for refusal to salute the flag, write or see school officials or members of Boards of Education, and call attention to the national flag salute law and the opinion of the Department of Justice. Seek to effect that reasonable settlement of the conflict.

2. In cases of mob or personal violence, write or see the local prosecuting officials; if that seems hopeless, and a federal question is involved by the participation of local officials or their failure to act, write the Civil Rights Section of the Department of Justice, Washington, D.C., or the local U.S. Attorney.

3. In cases of interference with the free distribution of literature on the streets or house to house, write or see the police officials or sheriff calling attention to the constitutional right to distribute literature free. If it is sold or contributions are asked,

and arrests are made under a licensing law, urge the repeal of the law as bad policy when applied to non-commercial matter, and as discriminatory if applied only to the Witnesses—for the sale of newspapers is not commonly licensed.

4. In cases of dismissals from employment for prejudice, write or see the employer or the union officials concerned.

5. In all cases, send letters of comment to local newspapers—to be published signed or unsigned—in order to help combat intolerance. Urge editors to comment.

Much can be done by local effort, even by individual citizens, to establish tolerance in these matters. Assistance can also be rendered by the national office of the A.C.L.U. to which clippings, information and copies of protests should be sent, to be reinforced by action from the national office.

Only vigorous action on the part of public and private agencies will succeed in overcoming the added war-time intolerances to Jehovah's Witnesses, and help maintain those liberties of speech, press and conscience so essential to us all in a democracy.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1942

No. 591

THE WEST VIRGINIA STATE BOARD OF EDUCATION, etc., et al.,

Appellants,

vs

WALTER BARNETTE, PAUL STULL and LUCY McCLURE,

Appellees.

BRIEF OF THE AMERICAN LEGION, Amicus Curiae

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IN THE

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No. 591

THE WEST VIRGINIA STATE BOARD OF EDUCATION, etc., et al.,
Appellants,

vs.

WALTER BARNETTE, PAUL STULL and LUCY McCLURE,
Appellees.

BRIEF OF THE AMERICAN LEGION, Amicus Curiae

AUTHORITY OF THE AMERICAN LEGION TO FILE BRIEF AS AMICUS CURIAE IN THIS CAUSE

The American Legion, as Amicus Curiae, filed with the Clerk of this Court the written consent of the parties to this Cause, authorizing it to file a Brief as Amicus Curiae herein as required by Section 9 of Rule 27 of this Court.

OPINIONS BELOW

The opinions of the court below are reported in 47 Fed. Supp. (Adv.), page 251.

JURISDICTION

A statement as to jurisdiction has been filed and separately printed, pursuant to Rule 12, Paragraph 1 of this

Court. Jurisdiction is invoked under Section 380, Title 28, U. S. C. A. Probable jurisdiction was noted January 4, 1943 (R. 62).

STATEMENT OF THE CASE

This is an appeal from the judgment of the United States District Court for the Southern District of West Virginia rendered by a three-judge court convened under the provisions of Section 266, amended, of the Judicial Code (28 U. S. C. A. 380). The suit involves the constitutionality of a regulation or order promulgated by the West Virginia State Board of Education under the provisions of Section 5, Article 2, Chapter 18 of the Code of West Virginia, 1931 (Appendix A), and subject to the provisions of Section 5-a, Article 8, Chapter 18 of the Code of West Virginia, as last amended (Appendix A-1), and Section 9, Article 2, Chapter 18 of the Code of West Virginia, as amended by Chapter 38, Acts of the Legislature, 1941 (Appendix A-2). The regulation of the Board (Appendix B) requires children and teachers in the public schools to salute the American flag and provides that such salute become a regular part of the program of activities in the public schools, with the further provision that refusal to salute the flag be regarded as an act of insubordination to "be dealt with accordingly." Section 5-a, Article 8, Chapter 18 of the Code of West Virginia, as amended (Appendix A-1), provides, among other things, that failure of a child to comply with the established regulations of the State Board of Education shall result in refusal of further admission of the child to school until such regulations are complied with.

Suit was instituted August 19, 1942, in the District Court of the United States for the Southern District of West Virginia by three persons belonging to the sect known as "Jehovah's Witnesses," the parents of children attending the public schools of West Virginia, against the Board of Education of the State of West Virginia; claiming Federal jurisdiction because the regu-

lation or order of the Board was a denial of religious liberty and was violative of rights which the First Amendment to the Federal Constitution protected against impairment by the Federal Government, and which the Fourteenth Amendment thereof protected against impairment by the states (R. 16); and further claiming jurisdiction in equity because of the absence of an adequate remedy at law (R. 15). The suit was brought by plaintiffs (appellees) in behalf of themselves, their children and all other persons in the State of West Virginia in like situation. The purpose of the suit was to secure an injunction restraining the West Virginia Board of Educaton (appellants) from enforcing against them an order or regulation requiring children in the public schools to salute the American flag (R. 1-16). The case was heard on application of appellees for an interlocutory injunction, but the parties to the suit agreed that it be submitted for a final decree on the bill of complaint and the motion of appellants to dismiss the bill.

Appellants moved to dismiss the bill on the grounds that the regulation of the Board was a proper exercise of power vested in it by the Legislature of the State of West Virginia; that under the doctrine of the case of *Minersville School District* v. *Gobitis*, 310 U. S. 586, the salute of the flag required by it could not be held to be a violation of religious rights of plaintiffs; and that the bill presented no substantial Federal question arising under the Constitution of the United States and involved no substantial Federal question because of the decision of this Court in the case of *Minersville School District* v. *Gobitis*, which decision had not been modified or overruled, and because there was no act of the Congress of the United States which undertook or purported to legislate with respect to the nature of the allegations contained in the complaint (R. 43-45).

It was and is the contention of appellees that to salute the flag, as required by the regulation of the Board, would do violence to the commands of Almighty God, according to Chapter 20 of the Book of Exodus (R. 3).

Disposition of Case by Trial Court

The court below determined that the regulation of the Board of Education, insofar as it required a salute to the flag from school children who have conscientious religious scruples against giving such salute, is violative of the rights of religious liberty guaranteed by the Fourteenth Amendment against infringement by the state; that plaintiffs were entitled to an injunction restraining the Board of Education, its agents and employees and all teachers in the schools of the state from requiring plaintiffs' children, or the children of other persons for whom the suit was brought and having religious scruples against giving the flag salute, to give such salute or from expelling them from school for failure to give the salute (R. 47-48).

Findings of Fact

Inasmuch as the case was submitted for decision upon the allegations of the bill of complaint and the averments of the motion to dismiss the same, the District Court summarized certain facts appearing therefrom. The court

> 1. That this is a suit to protect rights and privileges guaranteed by the 14th Amendment to the Constitution of the United States and the matter in controversy exceeds the sum or value of $3,000.00.
>
> 2. That plaintiffs are citizens of West Virginia and have children who attend the public schools of that state.
>
> 3. That plaintiffs and their children are members of a sect known as "Jehovah's Witnesses" and, as such, have conscientious scruples based on religious grounds against saluting the flag of the United States or any other national flag.

4. That the defendant, the West Virginia State Board of Education, has adopted a regulation requiring children in the public schools of the state to salute the flag of the United States and providing for their expulsion from school upon failure to give such salute.

5. That because of their conscientious scruples based on religious belief, plaintiffs and their children will not comply with the regulation of the Board of Education requiring the flag salute, and that the Board of Education unless restrained will expel plaintiffs' children from school for failure to comply therewith.

6. That, upon the expulsion of plaintiffs' children from school, they will be deprived of the benefit of education in the public schools to which they are entitled under the laws of West Virginia, and plaintiffs will have to pay to have them educated in private schools or be subject to prosecution under the compulsory education law of West Virginia for failure to send them to schools.

7. That this suit is brought by plaintiffs in behalf of themselves and all other persons similarly situated with respect to the enforcement of the regulation of the Board of Education.

Final Judgment

The court below in its final decree of October 6, 1942, awarded a permanent injunction restraining and inhibiting appellants from requiring the children of appellees, or any other children having religious scruples against such action, to salute the flag of the United States or any other flag, or from expelling such children from the public schools of the state for failure to salute it, as prayed for in plaintiffs' bill of complaint (R. 45-46).

SPECIFICATION OF ERRORS RELIED UPON

The American Legion as Amicus Curiae will rely upon the assignment of errors filed with the petition for appeal (R. 57) as constituting also the points stated to be relied upon (R. 60):

1. The Court erred in overruling defendants' motion to dismiss plaintiffs' complaint for want of jurisdiction.

2. The Court erred in holding, as a conclusion of law, that the regulation of the West Virginia State Board of Education, in so far as it requires a flag salute from school children who have conscientious scruples based on grounds of religion against giving such salute, is violative of the rights of religious liberty guaranteed by the 14th Amendment against infringement by the states.

3. The Court erred in holding, as a conclusion of law, that plaintiffs are entitled to an injunction restraining the State Board of Education, its agents and employees, and all teachers in the schools of the state from requiring plaintiffs' children or the children of other persons for whom the suit is brought, having religious scruples against giving the flag salute, to give such salute or from expelling them from school for failure to give same.

4. The Court erred in awarding the permanent injunction prayed for in the plaintiffs' bill.

5. The decision of the Court is counter to a decision of the Supreme Court of the United States handed down on June 3, 1940, in the case of *Minersville School District, Board of Education of Minersville School District, et al., Petitioners, v. Walter Gobitis, Individually, and Lillian Gobitis and William Gobitis, Minors, by Walter Gobitis, Their Next Friend*, reported in 310 U. S. 586, 84

Law. ed. 1375, which said decision has in no manner been overruled or modified.

SUMMARY OF ARGUMENT

I

The appellants' motion to dismiss the Bill of Complaint should be sustained as no substantial Federal question is involved.

Ex parte Poresky, 290 U. S. 30, 32;
Louisville & Nashville Railroad Company v. *Garrett*, 231 U. S. 298;
Utley v. *City of St. Petersburg*, 292 U. S. 106;
Leoles v. *Landers*, 302 U. S. 656;
Hering v. *State Board of Education*, 303 U. S. 624;
Minersville School District, et al. v. *Gobitis*, 310 U. S. 586, 594, 595.

II

House Joint Resolution 303 (Appendix C) does not supersede the Flag Salute Regulation adopted by appellants.

House Joint Resolution 303, Public Law 623, 77th Congress (second session), passed and approved June 22, 1942 (Appendix C).
Barnette et al. v. *The West Virginia State Board of Education*, 47 Federal Supp. 251, 255.

III

The regulation adopted by the West Virginia State Board of Education adheres to the principles enunciated by this Court and in no respect departs from or attempts to enlarge upon those principles.

Minersville School District, et al. v. *Gobitis*, 310 U. S. 586;
Haiter v. *Nebraska*, 205 U. S. 34, 42, 43.

IV

The regulation of the West Virginia State Board of Education was designed to promote national security without which the free exercise of religious beliefs would ultimately fail.

Halter v. *Nebraska*, 205 U. S. 34, 35;
Hamilton v. *University of California*, 293 U. S. 245, 266, 268;
Minersville School District, et al. v. *Gobitis*, 310 U. S. 586, 593.

V.

The Salute to the Flag and the Pledge of Allegiance as required by the regulation of the State of West Virginia Board of Education is not a religious rite and therefore not in conflict with the exercise of the religious views of the appellees.

People ex rel. Fish v. *Sandstrom*, 279 N. Y. 523-529, 530;
Bleich v. *Board of Public Instruction*, 139 Fla. 43-45, 190 So. 815.

ARGUMENT

I.

The Appellants' Motion to Dismiss the Bill of Complaint Should be Sustained as no Substantial Federal Question is Involved

The bill of complaint in this case alleges that the regulation promulgated by appellants requiring a salute to the Flag and the statutes of West Virginia pursuant to which such regulation was adopted violate the First and Fourteenth Amendments to the Constitution of the United States. Whether a substantial Federal question

is presented must be determined from a consideration of the allegations contained in the bill of complaint. *Ex parte Poresky*, 290 U. S. 30. In this case the court made the following observation:

> "• • • The question may be plainly unsubstantial, either because it is 'obviously without merit' or because 'its unsoundness so clearly results from the previous decisions of this court as to foreclose the subject and leave no room for the inference that the question sought to be raised can be the subject of controversy.' • • •"
>
> *Ex parte Poresky*, 290 U. S. 30, 32.

In the further case of *Louisville & Nashville Railroad Company v. Garrett*, 231 U. S. 298, it was held that unless the Federal question is substantial, the jurisdiction fails.

In the case of *Utley v. City of St. Petersburg, Florida*, 292 U. S. 106, the court laid down the principle that no substantial Federal question forming a basis for review by this court was presented by the contention of invasion of a constitutional right where such question had been settled by previous decision of this court.

In the case of *Leoles* v. *Landers*, 302 U. S. 656, the validity of a regulation of the School Board of Atlanta, Georgia, requiring all pupils attending public schools to participate in certain patriotic exercises, including an individual salute to the Flag by each pupil, was involved. In the further case of *Hering* v. *State Board of Education*, 303 U. S. 624, the validity of a statute of New Jersey providing that every Board of Education should require the pupils to salute the Flag and repeat the Pledge of Allegiance every school day, was in question. In each of these cases substantially the same constitutional question presented in the instant case was involved, and in each case this court dismissed the appeal for the want of a substantial Federal question.

In the case of *Minersville School District, et al* v. *Gobitis*, 310 U. S. 586, 594, 595, which is the last expression of this court on the question presented in the bill of complaint, the court in an exhaustive opinion determined the question in controversy herein in the following language.

> " " " The religious liberty which the Constitution protects has never excluded legislation of general scope not directed against doctrinal loyalties of particular sects. Judicial nullification of legislation cannot be justified by attributing to the framers of the Bill of Rights views for which there is no historic warrant. Conscientious scruples have not, in the course of the long struggle for religious toleration, relieved the individual from obedience to a general law not aimed at the promotion or restriction of religious beliefs. The mere possession of religious convictions which contradict the relevant concerns of a political society does not relieve the citizen from the discharge of political responsibilities. The necessity for this adjustment has again and again been recognized. In a number of situations the exertion of political authority has been sustained, while basic considerations of religious freedom have been left inviolate. Reynolds v. United States, 98 U. S. 145, 25 L. ed. 244; Davis v. Beason, 133 U. S. 333, 33 L. ed. 637, 10 S. Ct. 299; Selective Draft Law Cases (Arver v. United States), 245 U. S. 366, 62 L. ed. 349, 38 S. Ct. 159, L. R. A. 1918C 361, Ann. Cas. 1918B 856; Hamilton v. University of California, 293 U. S. 245, 79 L. ed. 343, 55 S. Ct. 197. In all these cases the general laws in question, upheld in their application to those who refused obedience from religious conviction, were manifestations of specific powers of government deemed by the legis-

> lature essential to secure and maintain that orderly, tranquil, and free society without which religious toleration itself is unattainable. * * *"

This case discusses and decides every substantial point raised by the appellees in their bill of complaint and expressly holds that a requirement that children attending public schools participate in a ceremony requiring a salute to the Flag and the Pledge of Allegiance does not infringe upon the due-process of law clause of the Constitution of the United States in its guarantee of religious liberties under the Fourteenth Amendment

II

House Joint Resolution 303 (Appendix C) Does Not Supersede the Flag Salute Regulation Adopted by Appellants

The appellees in their bill of complaint have advanced the contention that House Joint Resolution 303, Public Law 623, 77th Congress (2nd session) approved June 22nd, 1942 (Appendix C) supersedes Section 5, Article 2, Chapter 18 (Appendix A); Section 5A, Article 8, Chapter 18 (Appendix A-1), Section 9, Article 2, Chapter 18 (Appendix A-2) of the Code of West Virginia, 1931, as amended, and the regulation of the West Virginia State Board of Education (Appendix B) promulgated pursuant thereto. (Record—Pages 11 and 12.)

The court below disposed of this question in the following language:

> "We are not impressed by the argument that the powers of the School Board are limited by

> reason of the passage of the joint resolution of June 22nd, 1942, pertaining to the use and display of the flag."
>
> *Barnette et al.* v. *The West Virginia State Board of Education*, 47 Federal Supp. 251, 255.

We believe this is a sound conclusion. A careful examination of that resolution discloses that it was adopted merely for the purpose of codifying and emphasizing existing rules and customs pertaining to the display and use of the Flag of the United States of America and the resolution does not attempt to establish any new rules or customs not already recognized as being in existence. It is not mandatory and does not attempt to outline a course of conduct to be observed by children attending public schools as it only codifies customs and rules for proper respect to the Flag when it is being hoisted or lowered, or when it is passing in a parade or in a review. Section 5 of the Act is as follows:

> "That during the ceremony of hoisting or lowering the flag or when the flag is passing in a parade or in a review, all persons present should face the flag, stand at attention, and salute. Those present in uniform should render the right-hand salute. When not in uniform, men should remove the headdress with the right hand holding it at the left shoulder, the hand being over the heart. Men without hats merely stand at attention. Women should salute by placing the right hand over the heart. The salute to the flag in the moving column should be rendered at the moment the flag passes." (Appendix C.)

We do not believe that this resolution was intended to carry the force or effect given it by the appellees and that it in no way conflicts with the West Virginia statutes or the regulation of the West Virginia State Board of Education in question.

III

The Regulation Adopted by the West Virginia State Board of Education Adheres to the Principles Enunciated by This Court and in no Respect Departs from or Attempts to Enlarge Upon Those Principles

The preamble of the regulation of the West Virginia State Board of Education, reads in part as follows:

> "WHEREAS, The West Virginia State Board of Education honors the broad principle that one's convictions about the ultimate mystery of the universe and man's relation to it is placed beyond the reach of law; that the propagation of belief is protected whether in church or chapel, mosque or synagogue, tabernacle or meeting house; that the Constitutions of the United States and of the State of West Virginia assure generous immunity to the individual from imposition of penalty for offending, in the course of his own religious activities, the religious views of others, be they a minority or those who are dominant in the government, but
>
> WHEREAS, The West Virginia State Board of Education recognizes that the manifold character of man's relations may bring his conception of religious duty into conflict with the secular interests of his fellowman; that conscientious scruples have not in the course of the long struggle for religious toleration relieved the individual from obedience to the general law not aimed at the promotion or restriction of the religious beliefs; that the mere possession of convictions which contradict the relevant concerns of political society does not relieve the citizen from the discharge of political responsibility, and

WHEREAS, The West Virginia State Board of Education holds that national unity is the basis of national security; that the flag of our Nation is the symbol of our National Unity transcending all internal differences, however large within the framework of the Constitutions; that the Flag is the symbol of the Nation's power; the emblem of freedom in its truest, best sense; that it signifies government resting on the consent of the governed, liberty regulated by law, protection of the weak against the strong, security against the exercise of arbitrary power, and absolute safety for free institutions against foreign aggression, and

WHEREAS, The West Virginia State Board of Education maintains that the public schools, established by the legislature of the State of West Virginia under the authority of the Constitution of the State of West Virginia and supported by taxes imposed by legally constituted measures, are dealing with the formative period in the development in citizenship that the Flag is an allowable portion of the program of schools thus publicly supported." • • •

The regulation, of which the foregoing excerpt is a part, was adopted June 9th, 1942. Apparently, the purposes to be effected by such regulation were primarily based on the sound fundamental principles laid down in the case of *Minersville School District, et al.* v. *Gobitis*, 310 U. S. 586, decided by this court June 3rd, 1940. A careful comparison of said regulation with the opinion expressed by the court in the above case clearly discloses that the West Virginia State Board of Education had directly in mind the promotion of national unity and solidarity, both of which are recognized as proper functions of the state in said opinion. The language employed in said regulation in many respects is taken verbatim from said opinion. The object to be accomplished thereby is expressly approved in said case.

The right of a state to strengthen patriotism and the love of country among its people by legislation encouraging respect for the flag has long been recognized. In the case of *Halter* v. *Nebraska*, 205 U. S. 34, the court made the following comment:
at pages 42 and 43 of said opinion made the following comment:

> "So, a state may exert its power to strengthen the bonds of the Union, and therefore, to that end, may encourage patriotism and love of country among its people. When, by its legislation, the state encourages a feeling of patriotism towards the nation, it necessarily encourages a like feeling towards the state. One who loves the Union will love the state in which he resides, and love both of the common country and of the state will diminish in proportion as respect for the flag is weakened. Therefore a state will be wanting in care for the well-being of its people if it ignores the fact that they regard the flag as a symbol of their country's power and prestige, and will be impatient if any open disrespect is shown towards it. * * * * * that to every true American the flag is the symbol of the nation's power,—the emblem of freedom in its truest, best sense. It is not extravagant to say that to all lovers of the country it signifies government resting on the consent of the governed; liberty regulated by law; the protection of the weak against the strong; security against the exercise of arbitrary power; and absolute safety for free institutions against foreign aggression. As the statute in question evidently had its origin in a purpose to cultivate a feeling of patriotism among the people of Nebraska, we are unwilling to adjudge that in legislation for that purpose the state erred in duty or has infringed the constitutional right of anyone. On the contrary, it may reasonably

> be affirmed that a duty rests upon each state in every legal way to encourage its people to love the Union with which the state is indissolubly connected."

Thus the duty of strengthening the bonds of the Union is not alone a Federal function, but must be shared by each state and its citizens if the ultimate in national unity is to be attained. The West Virginia State Board of Education in adopting the regulation in question was not attempting to set up a state religion, nor was it attempting to abridge the right of individual citizens to the free exercise of their personal religious belief. The purpose was entirely different; it was not restrictive, but affirmative in character, the promotion of national unity. The results to be obtained in nowise transcended or indicated a trend in excess of the principles enunciated by this court in the case of *Halter* v. *Nebraska*, 205 U. S. 34 and *Minersville School District, et al* v. *Gobitis*, 310 U. S. 586. We realize that possibly in times of great national emergency, prejudiced majorities might seize upon expressions made by this court, to advance their cause against helpless minorities and attempt to place a construction on such expressions which was never intended. When such practices occur, we are content to rest the judgment of such action with the sound discretion of this court. The regulation in question, however, is neither an attempted departure from, nor extension of the principles announced by the court. It is merely the exercise of a function adopted in conformance therewith for the promotion of a great common end, national cohesion. It is not designed to establish or restrict religious beliefs, but for the advancement of "an interest inferior to none in the hierarchy of legal values." As stated by the court in the case of *Minersville School District, et al.* v. *Gobitis*, 310 U. S. 586-595, to-wit:

> "National unity is the basis of national security. To deny the legislature the right to select appropriate means for its attainment presents a totally different order of problem from that of the propriety of subordinating the possible ugliness of littered streets to the free expression of opinion through distribution of handbills. Compare Schneider v. Irvington, 308 U. S. 147, ante, 155, 60 S. Ct. 146."

Doubtless, thousands of communities have adopted the salute to the Flag and the Pledge of Allegiance as a part of the training in the school room since the decision in *Minersville School District et al.* v. *Gobitis*, 310 U. S. 586 and this expression of patriotism has now become an accepted movement in the formative period of the child's education for the development of future citizenship. It would be going very far to say that the regulation in question had no reasonable connection with the common good and was not promotive of a sound public policy or that it did not strengthen national security without the preservation of which the very rights for which the appellees contend would ultimately be destroyed.

IV

The Regulation of the West Virginia State Board of Education was Designed to Promote National Security Without Which the Free Exercise of Religious Beliefs Would Ultimately Fail

The Regulation of the West Virginia State Board of Education (Appendix B) was designed to promote national security. The exercise of this function by a state is recognized in the case of *Minersville School District* v. *Gobitis*, 310 U. S. 586, 596 in the following language:

> "Unlike the instances we have cited, the case before us is not concerned with an exertion of the legislative power for the promotion of some specific need or interest of secular society—the protection of the family, the promotion of health, the common defense, the raising of public revenues to defray the cost of government. But all these specific activities of government presuppose the existence of an organized political society. The ultimate foundation of a free society is the binding tie of cohesive sentiment. Such a sentiment is fostered by all those agencies of the mind and spirit which may serve to gather up the traditions of a people, transmit them from generation to generation, and thereby create that continuity of a treasured common life which constitutes a civilization."

The events which have transpired in our national life since the rendition of this decision have demonstrated that an adequate national defense is not alone concerned with armies and navies and matters distinctly military in character, but includes as well, the moral strength or public opinion of its citizens. This is vital to the maintenance of national security. Government can be destroyed more quickly by assaults from within than by attack from without. Nations have been destroyed by a break down in the public morale. Consequently, the state through its educational institutions is justified in adopting measures which will engender patriotism in the young people, who will represent the succeeding generations, for the great task of preserving the foundations upon which freedom of religious expression is founded. The paramount issue in the United States within the past two years has been national unity against forces which, if they were successful, would destroy the liberties upon which freedom of religion is based. This issue has permeated our entire structure from the National Government down to the smallest community.

The individual citizen has been impressed with the fact that his duty in this respect is of prime importance. The movement has no element of hysterics, but is predicated on the sound premise that the national conscience must be made aware of the necessity for national cohesion if we are to have national security. A state is not required to wait until the danger to public welfare is imminent, but may adopt sound measures to correct an evil in its inception. The regulation in question is not a war-time measure, but quite the contrary. It was designed to promote through educational means a better citizenship for the future and thus guarantee national security for succeeding generations.

It cannot be said that this regulation does not promote the common good in view of the fact that during the past few years we have witnessed the fall of many nations composed of liberty-loving people because their national security was not adequate.

The legislative body of a state has the right to establish and promote a sound public policy under the Tenth Amendment to the Constitution, and the courts have been slow in restricting the exercise of this right excepting in cases where some other right equally precious has been at stake.

> *Halter* v. *Nebraska*, 205 U. S. 34, 35;
> *Hamilton* v. *University of California*, 293 U. S. 245, 266;
> *Minersville School District* v. *Gobitis*, 310 U. S. 586, 593.

In the case of *Hamilton* v. *University of California*, 293 U. S. 245, Associate Justice Cardoza in a concurring opinion at page 266 of that decision made the following comment in this connection:

> "This may be condemned by some as unwise or illiberal or unfair when there is violence to conscientious scruples, either religious or merely

> ethical. More must be shown to set the ordinance at naught. In controversies of this order courts do not concern themselves with matters of legislative policy, unrelated to privileges or liberties secured by the organic law."

The freedom to follow conscience is a relative right, and while it may be exercised freely when not in conflict with some other right equally as well recognized, yet it must give way to the superior authority of a free people to adopt legislative policies which have for their ultimate purpose the very preservation of such right.

In discussing this right of the individual, Associate Justice Cardoza in the above cited case of *Hamilton* v. *University of California*, 293 U. S. 245, at page 268 stated as follows:

> "The right of private judgment has never yet been so exalted above the powers and the compulsion of the agencies of government. One who is a martyr to a principle—which may turn out in the end to be a delusion or an error—does not prove by his martyrdom that he has kept within the law."

V

The Salute to the Flag and the Pledge of Allegiance as Required by the Regulation of the State of West Virginia Board of Education is not a Religious Rite and Therefore not in Conflict with the Exercise of the Religious Views of the Appellees

The salute to the Flag and the Pledge of Allegiance required of the school children under the regulation adopted by the West Virginia State Board of Education (Appendix B) is not a requirement pertaining to reli-

gion. The salute to the Flag by the placing of the right hand upon the breast is an act of respect of the highest order to the symbol of freedom. It in no way conflicts with the individual's freedom to worship Jehovah and was never intended to conflict therewith. It merely recognizes that the Flag represents the freedom upon which religious liberty rests—one of the most beloved rights yet developed by a political society. This salute does not engender in the mind of the individual the thought that the Flag is an image to be worshiped, or that it is a part of a religious rite. To assume such a position would be an admission that human emotions involving acts of respect and devotion all fall in the same category, and yet human experience teaches that this is not true. The devotion to Jehovah is as distinguishable from an act of respect towards the Flag as the love which a man bears to a devoted wife is different from the devotion he bears to his children. Nor is the Pledge of Allegiance a restriction upon the appellees exercise of their religious beliefs. A pledge is a promise (see Webster's New International Dictionary, Second Edition) as distinguished from an oath which might be termed a declaration invoking the Supreme Power. If the term "promise" is substituted for the word "pledge" in respect to the Pledge of Allegiance, it would read as follows:

> "I promise allegiance to the Flag of the United States of America and to the Republic for which it stands; one nation indivisible, with Liberty and Justice for all."

Thus, the individual making this pledge merely promises allegiance to the symbol of freedom and to the Republic which has exalted that freedom under which religious liberties are protected. It is a pledge of support to a political system which has established the right to worship Jehovah as the individual conscience dictates. The distinction is clearly pointed out in the recent cases of: *People ex rel. Fish* v. *Sandstrom*, 279 N. Y. 523, 529,

530; *Bleich* v. *Board of Public Instruction*, 139 Fla. 43, 45, 190 So. 815. Consequently, the salute to the Flag and the Pledge of Allegiance are promotive of the appellees rights and not restrictive, as they contend. A construction should be given to this ceremony in keeping with its intended purposes and in accord with the end to be accomplished.

VI

Legion's Position

The American Legion is interested in the preservation and promotion of national security, yet also believes in the preservation and protection of individual religious freedom as given by the First and Fourteenth Amendments to the Constitution and that this right should always be given freedom of expression except where it may conflict with the rightful exercise of that authority under which such freedom was created and through which it is protected.

The Preamble to the Legion's Constitution is prefaced with the clause: "For God and Country we associate ourselves together for the following purposes." The Preamble contains the following precepts

> "To uphold and defend the Constitution of the United States of America; to maintain law and order; to foster and perpetuate a one hundred per cent Americanism; to preserve the memories and incidents of our association in the Great War; to inculcate a sense of individual obligation to the community, state and nation; to combat the autocracy of both the classes and the masses; to make right the master of might; to promote peace and good will on earth; to safeguard and transmit to posterity the principles of Justice, Freedom and Democracy; to consecrate and sanctify our comradeship by our devotion to mutual helpfulness."

Our organization is composed of more than one million members who fought abroad and served at home in the last War in order to preserve and perpetuate our national security, upon which all of the freedoms which the individual citizen enjoys, is predicated. We therefore believe that when this security is involved it should be given prime consideration. Consequently, we feel that the regulaton in question, being promotive of national security, should be upheld.

VII

CONCLUSIONS

It is respectfully submitted:

(1) That appellants' motion to dismiss the bill of complaint should be sustained.

(2) That the flag salute regulation promulgated by appellants and the statutes of West Virginia affording a basis in law therefor, does not violate any of the provisions of the Constitution of the United States.

(3) That this Court in well-considered decisions has determined all of the questions raised in this case adversely to the contentions of appellees.

(4) That neither the West Virginia statutes nor the regulation of appellants complained of by appellees has been superseded by any act of the Congress of the United States.

(5) That the judgment appealed from should be reversed.

Respectfully submitted,

RALPH B. GREGG,

National Judge Advocate and General Counsel for The American Legion, Amicus Curiae.

APPENDIX A

Section 5, Article 2, Chapter 18, Code of West Virginia, 1931:

General Powers and Duties.—Subject to and in conformity with the Constitution and laws of this State, the state board of education shall determine the educational policies of the State, except as to the West Virginia university, and shall make rules for carrying into effect the laws and policies of the State relating to education, including rules relating to the physical welfare of pupils, the education of feeble-minded and physically disabled or crippled children of school age, retirement fund for teachers, school attendance, evening and continuation or part time day schools, school extension work, the classification of schools, the issuing of certificates upon credentials, the purchase, distribution and care of free textbooks by the district boards of education, the general powers and duties of county and district boards of education, and of school trustees, teachers, principals, supervisors, and superintendents, and such other matters pertaining to the public schools in the State as may seem to the board to be necessary and expedient.

APPENDIX A-1

Section 5-a, Article 8, Chapter 18, Code of West Virginia, 1931, as amended by Chapter 32, Acts of the Legislature, Reg. Sess., 1941:

Child Dismissed, Suspended, or Expelled from School for Failure to comply with Requirements and Regulations Treated as Unlawfully Absent.—If a child be dismissed, suspended, or expelled from school because of refusal of such child to meet the legal and lawful requirements of the school and the established regulations of the county and or state board of education, further admission of the child to school shall be refused until such requirements and regulations be complied with. Any such child shall be treated as being unlawfully absent from the school during the time he refuses to comply with such requirements and regulations, and any person having legal or actual control of such child shall be liable to prosecution under the provisions of this article for the absence of such child from school.

APPENDIX A-2

Section 9, Article 2, Chapter 18, Code of West Virginia, 1931, as amended by Chapter 38, Acts of the Legislature, Reg. Sess., 1941:

Courses of Instruction in History, Civics, Constitutions, Alcoholic Drinks, Narcotics; Textbooks on Health, Biology and Social Sciences to Contain Appropriate Materials on Effects of Alcoholic Drinks and Narcotics; Violations; Penalties.—In all public, private, parochial and denominational schools located within this state there shall be given regular courses of instruction in history of the United States, in civics, and in the constitutions of the United States and of the state of West Virginia, for the purpose of teaching, fostering and perpetuating the ideals, principles and spirit of Americanism, and increasing the knowledge of the organization and machinery of the government of the United States and of the state of West Virginia. The state board of education shall, with the advice of the state superintendent of schools, prescribe the courses of study covering these subjects for the public elementary and grammar schools, public high schools and state normal schools. It shall be the duty of the officials or boards having authority over the respective private, parochial and denominational schools to prescribe courses of study for the schools under their control and supervision similar to those required for the public schools.

* * *

Any person violating the provisions of this section shall be guilty of a misdemeanor, and, upon conviction thereof, shall be fined not exceeding ten dollars for each violation, and each week during which there is a violation shall constitute a separate offense. If the person so con-

victed occupy a position in connection with the public schools, he shall also automatically be removed from such position, and shall be ineligible for reappointment to that or a similar position for the period of one year.

APPENDIX B

Regulation of the West Virginia State Board of Education, adopted June 9, 1942:

WHEREAS, The West Virginia State Board of Education holds in highest regard those rights and privileges guaranteed by the Bill of Rights in the Constitution of the United States of America and in the Constitution of West Virginia, specifically, the first amendment to the Constitution of the United States as restated in the fourteenth amendment to the same document and in the guarantee of religious freedom in Article III of the Constitution of this State, and

WHEREAS, The West Virginia State Board of Education honors the broad principle that one's convictions about the ultimate mystery of the universe and man's relation to it is placed beyond the reach of law; that the propagation of belief is protected whether in church or chapel, mosque or synagogue, tabernacle or meeting house; that the Constitutions of the United States and of the State of West Virginia assures generous immunity to the individual from imposition of penalty for offending, in the course of his own religious activities, the religious views of others, be they a minority or those who are dominant in the government, but

WHEREAS, The West Virginia State Board of Education recognizes that the manifold character of man's relations may bring his conception of religious duty into conflict with the secular interests of his fellowman; that conscientious scruples have not in the course of the long struggle for religious toleration relieved the individual from obedience to the general law not aimed at the promotion or restriction of the religious beliefs; that the mere possession of convictions which contradict the relevant con-

verns of political society does not relieve the citizen from the discharge of political responsibility, and

WHEREAS, The West Virginia State Board of Education holds that national unity is the basis of national security; that the flag of our Nation is the symbol of our National Unity transcending all internal differences, however large within the framework of the Constitutions; that the Flag is the symbol of the Nation's power; the emblem of freedom in its truest, best sense; that it signifies government resting on the consent of the governed, liberty regulated by law, protection of the weak against the strong, security against the exercise of arbitrary power, and absolute safety for free institutions against foreign aggression, and

WHEREAS, The West Virginia State Board of Education maintains that the public schools, established by the legislature of the State of West Virginia under the authority of the Constitution of the State of West Virginia and supported by taxes imposed by legally constituted measures, are dealing with the formative period in the development in citizenship that the Flag is an allowable portion of the program of schools thus publicly supported.

Therefore, be it RESOLVED, That the West Virginia Board of Education does hereby recognize and order that the commonly accepted salute to the Flag of the United States—the right hand is placed upon the breast and the following pledge repeated in unison: "I pledge allegiance to the Flag of the United States of America and to the Republic for which it stands; one Nation, indivisible, with liberty and justice for all"—now become a regular part of the program of activities in the public schools, supported in whole or in part by public funds, and that all teachers as defined by law in West Virginia and pupils in such schools shall be required to participate in the salute honoring the Nation represented by the Flag; provided, however, that refusal to salute the Flag be regarded as an act of insubordination, and shall be dealt with accordingly.

APPENDIX C

House Joint Resolution 303, Public Law 623—77th Congress (second session), passed and approved June 22, 1942:

Joint Resolution to codify and emphasize existing rules and customs pertaining to the display and use of the flag of the United States of America.

Resolved by the Senate and House of Representatives of the United States of America in Congress assembled, That:

The following codification of existing rules and customs pertaining to the display and use of the flag of the United States of America be, and it is hereby, established for the use of such civilians or civilian groups or organizations as may not be required to conform with regulations promulgated by one or more executive departments of the Government of the United States.

• • •

Sec. 5. That during the ceremony of hoisting or lowering the flag or when the flag is passing in a parade or in a review, all persons present should face the flag, stand at attention, and salute. Those present in uniform should render the right-hand salute. When not in uniform, men should remove the headdress with the right hand holding it at the left shoulder, the hand being over the heart. Men without hats merely stand at attention. Women should salute by placing the right hand over the heart. The salute to the flag in the moving column should be rendered at the moment the flag passes.

Supreme Court of the United States

OCTOBER TERM, 1942

No. 591

THE WEST VIRGINIA STATE BOARD OF EDUCATION, etc., et al.,

Appellants,

v.

WALTER BARNETTE, PAUL STULL, AND LUCY McCLURE,

Appellees.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA

BRIEF OF THE COMMITTEE ON THE BILL OF RIGHTS, OF THE AMERICAN BAR ASSOCIATION, AS FRIENDS ~~ON~~ OF THE COURT.

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Supreme Court of the United States

No. 591 **October Term, 1942**

THE WEST VIRGINIA STATE BOARD OF EDUCATION, etc., et al.,

Appellants,

vs.

WALTER BARNETTE, PAUL STULL, AND LUCY McCLURE,

Appellees.

BRIEF OF THE COMMITTEE ON THE BILL OF RIGHTS, OF THE AMERICAN BAR ASSOCIATION, AS FRIENDS OF THE COURT.

Preliminary Statement.

This brief is filed by the Committee on the Bill of Rights, of the American Bar Association, as friends of the Court.[1] This Committee was permitted to intervene in the same capacity in Minersville School District v. Gobitis, 310 U.S. 586 (1940), which involved similar issues of the constitutionality of the compulsory flag salute for children in the public schools. The Committee appears with due authority from the American Bar Association, given in the manner described in our brief in the Gobitis case, to which we beg leave to refer. The consent of counsel for the parties has also been given.

The Gobitis case related to the constitutionality of a regulation of the Minersville School District in Pennsylvania estab-

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[1] The membership of the Committee is as follows: Douglas Arant, Chairman (Alabama); Julius Birge (Indiana); George L. Buist (South Carolina); William D. Campbell (California); Zechariah Chafee, Jr. (Massachusetts); L. Stanley Ford (New Jersey); Abe Fortas (District of Columbia); George I. Haight (Illinois); H. Austin Hauxhurst (Ohio); Monte M. Lemann (Louisiana); Alvin Richards (Oklahoma); Earl F. Morris (Ohio); Burton W. Musser (Utah); Basil O'Connor (New York). George L. Buist does not join in this brief.

lishing the compulsory flag salute. The brief filed by this Committee opposed its constitutionality. The majority of the Court upheld the regulation. The present Chief Justice filed a dissenting opinion, contending that there had been an unconstitutional denial of religious liberty.

The case at bar concerns the constitutionality of a resolution of the West Virginia Board of Education, adopted January 9, 1942, requiring all pupils in the West Virginia public schools to participate regularly in a salute of the flag; and saying a refusal so to salute shall be regarded as an act of insubordination and dealt with accordingly. This means that the child will be excluded from school until he complies, and that his parents are liable to prosecution for his absence.[2]

This suit was brought in the United States District Court to enjoin the enforcement of the resolution by the Board of Education and other defendants. The plaintiffs are three members of an unincorporated religious body called Jehovah's witnesses, with children of compulsory school age, and they sue for the benefit of their own children and for all other Jehovah's witnesses in West Virginia who are similarly situated and their children, said to aggregate many hundreds. They state that all Jehovah's witnesses sincerely believe that the act of participating in the flag-saluting ceremony violates the Biblical Commandment against bowing down to graven images. The facts, as found by the trial court,[3] are that the plaintiffs and their children have conscientious scruples based on religious grounds against saluting the flag; that because of such scruples the children will not comply with the regulation of the Board of Education and will be expelled from school; and that the children will thus be deprived of public school education, and the plaintiffs will either have to pay to have them educated in private schools or be subject to prosecution under the compulsory education law of West Virginia for failure to send them to school.

The plaintiffs claim that they are thus deprived of the "liberty" guaranteed to them by the Fourteenth Amendment,

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[2] W. Va. Code (1931) Chap. 18, Art. 8, as amended by Acts of Legis. (1941) c. 32.

[3] Record, p. 47.

which includes religious liberty guaranteed by the First Amendment. They say the resolution of the Board of Education on January 9, 1942, is also invalid because it has been superseded by a Joint Resolution of Congress of June 22, 1942.[4] Here Congress, after describing the pledge of allegiance to the flag, provided as follows:

> "However, civilians will always show full respect to the flag when the pledge is given by merely standing at attention, men removing their headdress. Persons in uniform shall render the military salute."

The defendants moved to dismiss the action for various reasons, including the constitutionality of the West Virginia regulation and the fact the complaint goes counter to the decision of this Court in the Gobitis case.

The district court of three judges, declining to follow the Gobitis decision, held the compulsory flag salute unconstitutional in so far as it applies to children having conscientious scruples, and enjoined its enforcement as to them. 47 F. Supp. 251 (1942). The defendants have appealed.

The Committee's Position.

The Committee has no interest in this litigation save as its outcome will affect the integrity of the basic right to freedom of conscience. Consequently, this brief will not discuss the effect of the Joint Resolution of Congress. This omission does not indicate any belief on our part that this federal statute is immaterial,[5] but simply that our sole concern is with the proper scope of religious liberty.

The constitutional issues in this case are the same as those in the Gobitis case. Therefore, the Committee has filed this brief in the hope that the Court will now, upon a reconsideration of that case, decide to follow the opinion of the present Chief Justice.

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[4] 56 Stat. 380, 36 U.S.C.A., 1942 Cum. Supp. § 172.

[5] In fact, the majority opinion gave as one reason for upholding the Pennsylvania local regulation in 1940: "It is to be noted that the Congress has not entered the field of legislation here under consideration." 310 U.S. at 600, n. 7. Congress has since entered the field by the Joint Resolution of 1942.

ARGUMENT.

The Committee believes that the constitutional prohibition against the deprivation of liberty without due process of law is violated by the enforcement of the compulsory flag salute against children who have sincere religious scruples against participating in this ceremony. The reasons for the invalidity of the regulation are set forth fully in the opinion of the present Chief Justice in the Gobitis case and in the brief which this Committee filed in that case, to which we respectfully beg the Court to refer. The two essential reasons for our position will be briefly stated in this brief.

I.

The flag salute in its application to the plaintiffs and their children should be treated by this Court as a religious ceremony.

Most of us may regard it as merely a beneficial training in patriotism, as a "gesture of respect for the symbol of our national life"; but it does have religious significance *for them*. They feel it to be an idolatrous worship abhorrent to their deep spiritual emotions, a deadly sin to be shunned under peril of damnation. Therefore *as to them* it must be judged as a restraint on religious liberty which can only be justified, if at all, by very strong contravening public good. This problem of justification will be discussed under our second argument, but our immediate point is that such justification is necessary. The court may have to prevent a man from following the pathway revealed to him by the inner light, but it must not tell him that the inner light does not shine. The right of private judgment as to the religious quality of one's own conduct should be held inviolate. For a court to deny that right would strike at the heart of religious freedom. No American judge should presume to tell any person that he is wrong in his opinion as to how he may best serve the God in whom he believes.

This conclusion results naturally from the traditional American attitude toward small religious groups, an attitude which

forms an integral part of our way of life. These small groups have been accorded all rights and privileges granted to the larger and more ancient religious bodies.

It is of course true, even under Bill of Rights, that particular religious views from time have had to yield to the paramount demands of public health, safety or morals. But that, as we have just said, is an entirely distinct problem. Courts are competent to judge when the public welfare is in fact jeopardized by a belief, but they are not competent to judge that the belief is not religious. Here analysis and logic must yield to simple faith. It should, we submit, be deemed inadmissible for a court to brush aside a *sincere* religious objection because the same scruple is not held by most of the people, or because in the court's own view the scruple is theologically unsound. Such an official determination would presuppose a unity between church and state which is foreign to our most basic institutions.

The issue as to whether the individual should be the sole judge of his own religious belief is a very old one. For centuries, various sects have honestly ascribed religious significance to acts and ceremonies that, to the vast majority, held no religious meaning whatever. The Jews in Pilate's time considered the carrying of busts of the Emperor Tiberius through the streets of Jerusalem to be a violation of the Biblical Commandment involved in the present case. The early Christian soldiers thought the wearing of laurel wreaths to be incompatible with Christianity. The Quakers in seventeenth-century England declined to uncover their heads in court. The record of history shows that the existence and seriousness of religious beliefs are not to be measured by the current opinion of the time. The truth is that the existence of religious scruples lies within the mind and heart of the individual man or woman, and nowhere else. Here a man is the only judge of himself. No outsider, not even legislature or court, can decide what pathway will lead his spirit to salvation or what road will take him to a moral or a physical hell. Therefore the compulsion of a child to participate in a ceremony which he considers idolatrous worship cannot be brushed aside as raising no issue of religious liberty. For that child religious liberty is just as much at stake in his expulsion from the only

school his parents can afford as it was at stake for the Scotch Covenanters who were harried for refusing to listen to the Anglican prayer-book or for the English Catholics when they were heavily fined for absence from the parish church.

II.

This impairment of religious liberty has no reasonable tendency to promote any public interest.

Since the compulsory flag salute thus impairs the religious liberty of these children to worship only in their own way and the liberty of these parents to bring up their children in their own faith, the regulation must be invalid *as to them* unless it be essential for the attainment of some public purpose which is so important as to outweigh even the right to religious freedom. We do not contend that religious liberty is unlimited, but only that limits must be justified by a plain and strong public need. No clear showing has been made here, we submit, of any public good which is served by a ceremony regarded by the unwilling participants as idolatrous.

In the first place, this legislation is of a sort new to America. It is an attempt to *compel* a particular expression as distinguished from *restraints* on certain kinds of expression. Judges have recognized the validity of prohibitions against various practices even though they were actuated by religious motives, such as bigamy and polygamy, human sacrifices, suttee, thuggery and the religious belief in assassination, promiscuous sexual intercourse, the possession of sacramental wine in excess of a statutory limit, burial customs dangerous to health, and spiritualistic fortune-telling.* There the individual was forbidden to do something which he believed holy. It is a much more serious interference with his religious liberty to order him to do something which he believes to be unholy like participation in a religious ceremony violative of his beliefs. There is no precedent prior to the flag salute legislation for requiring a person to perform a particular ceremony contrary to his religious beliefs. The present regulation is novel also in that the legislative power is not here exercised, as in the cases just listed, in furtherance of the safety, morals, physical health or economic welfare of the people. In the few situations where religion was held not to excuse the

* The authorities for these and other prohibitions are given in the Committee's *Gobitis* brief, p. 28.

failure to perform affirmative acts, those acts were important in themselves, not a ceremony, and they bore a close relation to the public health and safety like furnishing medical aid to sick children or military training.[7] But the object of the present law is not to obtain definitely useful services, but merely to produce a state of mind. Religious liberty is now to be limited for the novel purpose of presumably promoting loyalty and morale and national unity.

The vital question before the Court is whether there is any clear relation between these purposes and this ceremony when performed by children who believe it a deadly sin. The resplendence of national unity and loyalty should not blind the Court to the need for clear proof that these purposes will be furthered by the *coercion of these children*. The advocates of the union of Church and State have constantly argued that it would promote national unity for all citizens to join in a common religious ceremony. True enough if there were no dissenters to whom the ceremony is abhorrent. Since there are dissenters, we Americans learned long ago that nothing is gained by forcing them to join in acts which they think impious. Therefore, an extension of American legislative power in this direction should be viewed with suspicion, and, *in the absence of a showing of clear necessity*, should be condemned as a deprivation of individual liberty without due process of law.

In any search for the required proof, it is important to recognize that the compulsory flag salute by children who object to it on religious grounds is an entirely different thing from such a salute by children who accept it as a mere gesture of proper respect to the nation we love. Any arguments that the salute is useful training to children in general have no bearing on the problem of its value to the few children who abhor it as image-worship. No evidence has been offered to prove that the salute has any educational value to such objectors, and the probabilities are so strongly to the contrary that the gap cannot be filled by judicial notice. The contention that the morale and loyalty of the children participating willingly would suffer if

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[7] See the authorities cited on page 29 of our *Gobitis* brief.

the objectors were excused from the ceremony also rests on no evidence in the case or common knowledge to serve as the basis of judicial notice; and it is squarely rebutted by the present Chief Justice:[8]

> ". . . I cannot say that the inconveniences which may attend some sensible adjustment of school discipline in order that the religious convictions of these children may be spared, presents a problem so momentous or pressing as to outweigh the freedom from compulsory violation of religious faith which has been thought worthy of constitutional protection."

The vital question whether there is any reasonable connection between the attainment of national unity and the compulsory flag salute *by these children* against their consciences should, we submit, be answered by this Court. And it is for this Court to decide whether this relationship, if it exist, is sufficiently close to outweigh the value of religious liberty. Judgments of this nature cannot be entrusted to legislatures or school boards in cases involving civil liberties under the Bill of Rights. Such has not been the practice of this Court. In *Hague* v. *Committee for Industrial Organization*, 307 U.S. 496 (1939), the Court did not accept the judgment of the government of Jersey City that there was a necessary relationship between closing the streets and parks to speakers and the promotion of public safety. Here there was much more of a possible relationship shown by experience than that between a hateful ceremony and national unity, but the Court examined the connection itself and held it too thin to offset the right of free assembly. In *Stromberg* v. *California*, 283 U.S. 359 (1931), the connection between punishing salutes of the red flag and public safety was much more obvious than that between unwillingly saluting the United States flag and national unity in the case at bar. Yet the Court did not accept the judgment of the California legislature as to the sufficiency of the connection. Indeed, the Court held that the relationship was too remote to constitute the clear and present danger of overt acts which is essential for the denial of freedom

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[8] Minersville School District v. Gobitis, 310 U.S. at 607.

of speech. The same severe scrutiny of the alleged relationship between the compulsory flag salute and national unity seems indispensable, in the case at bar, unless this Court be ready to hold that religious liberty plays a less important part in our national life than liberty of speech.

This is not a contest between two powerful economic groups, where the side which suffers from a statute has a fair chance to obtain a revision of the law from another legislature after a fresh election through the use of normal democratic processes. In such contests this Court hesitates to substitute its judgment for that of the legislature. Here, however, the contest is hopelessly unequal as the Chief Justice points out:[9]

> "Here we have such a small minority entertaining in good faith a religious belief, which is such a departure from the usual course of human conduct, that most persons are disposed to regard it with little toleration or concern."

Such a small religious group is very unlikely to attain sufficient voting power to overthrow compulsory flag salute laws. It must obtain protection from the Bill of Rights, or nowhere. Surely the First Amendment was not written to put the religious liberty of small groups at the mercy of legislative majorities and school boards.

> "The Constitution expresses more than the conviction of the people that democratic processes must be preserved at all costs. It is also an expression of faith and a command that freedom of mind and spirit must be preserved, which government must obey, if it is to adhere to that justice and moderation without which no free government can exist."[10]

In *Hague* v. *Committee for Industrial Organization*, 307 U.S. 496 (1939) and in *Schneider* v. *New Jersey*, 308 U.S. 147 (1939), this Court held that, when the fundamental individual liberties are at stake, the government is *restricted in its choice of methods* and may even be required to adopt some relatively inefficient and inconvenient means when it wants to achieve a proper purpose.

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[9] Minersville School District *v.* Gobitis, 310 U.S. at 606.

[10] Stone, J., in Minersville School District *v.* Gobitis, 310 U.S. at 606–7.

If this doctrine is applicable to freedom of speech, is it not applicable also to the equally basic guarantee of liberty of conscience?

The Committee submits that the present case falls squarely within the rule of the *Hague* and *Schneider* decisions, and that the petitioner school authorities are required by the Constitution to adopt some alternative method or methods of fostering patriotism in school children instead of insisting upon the imposition of the salute upon children who object to it on religious grounds. Various alternative methods of this end are available and will readily occur to the Court.

Therefore, we contend that no public interest has been established sufficient to justify the enforcement of the compulsory flag salute against these children. The only public interest alleged is the promotion of loyalty, morale, and national unity. Even if such vague concepts can ever validate a law which interferes with religious liberty, they should not do so unless such interference is shown to be clearly needed to attain these purposes. Since the constitutional protection of religious freedom requires the Court to pass upon the alleged relationship between the law and the public interest instead of accepting the judgment of the school authorities upon a constitutional issue, then we believe that the Court will find no proof of any sort that the enforced participation of these children in a ceremony which they regard as sinful idolatry will promote either their loyalty or the loyalty of their schoolmates.

III.

The subsequent effect of the Gobitis Case shows the soundness of the opinion of the present Chief Justice that the compulsory flag salute is unconstitutional as to these children.

Instead of further arguments, we shall devote the rest of this brief to material of an entirely different kind which has become available since that case was decided. This material will show the effect of the *Gobitis* case in three respects:

1. The opinion of the present Chief Justice has been overwhelmingly accepted by subsequent legal discussion as the sound presentation of the proper scope of religious liberty.

2. In so far as school authorities have been affected by the actual decision of the Court, the result has been harmful to religious liberty.

3. State courts, instead of being influenced by the actual decision, have tended to follow the reasoning of the present Chief Justice.

We venture to hope that this material will assist the Court in reaching the conclusion that the opinion of the present Chief Justice should have been adopted as the decision of the Court in the *Gobitis* case, and that the Court will now adopt that opinion as the basis of constitutional protection for religious liberty.

1. *Legal discussion of the Gobitis decision overwhelmingly supports the opinion of the present Chief Justice.*

Legal discussion of a contemporary constitutional decision, so far as it gets into print, must be mainly obtained from legal periodicals, the reports of bar associations, and similar sources. Treatises are unlikely to be sufficiently up-to-date. A careful examination of the material just described shows that the Gobitis case has been discussed in 22 different legal publications (some-

times more than once). Out of these 22, 18 approve the opinion of the present Chief Justice; only 2 agree with the decision of the Court; and 2 simply describe the case without taking sides. Of course law is not made by counting the noses of law reviews and a moderate majority would have little importance for the present case. But when 18 out of the 20 publications taking sides on the issue regard the opinion of the present Chief Justice as the sound exposition of religious liberty, this fact shows a definite trend of professional opinion which ought not to be ignored. To find a precedent for such overwhelmingly adverse professional criticism of a decision by the Court, we should have to go back to *Adkins* v. *Children's Hospital*, 261 U.S. 525 (1923), which held that Congress could not constitutionally establish a minimum wage for women and children.

It is true that, if we leave aside the articles by law professors and practitioners, the comments cited were written by young men and women studying in law schools; but they are none the less important for being the thoughts of youth. The writers are among the ablest students in their respective schools. They are the bar and bench of the near future, so that their views forecast professional opinion. All of them wrote in 1940 and 1941 with the knowledge that they might soon be required to risk their lives in the defense of the nation. Therefore, the virtually unanimous belief of these young men and women that religious liberty must not be sacrificed for a supposed effort to promote patriotism is a strong indication that the opinion of the present Chief Justice truly expresses the meaning of the Bill of Rights.

Space permits only the quotation of a few brief extracts from this contemporary legal discussion of the *Gobitis* case. There is much of value in the other citations which are listed below.

Professor Thomas Reed Powell of Harvard Law School has written a careful examination of the decision in his essay, "Conscience and the Constitution," in a book edited by W. T. Hutchinson, *Democracy and Unity* (University of Chicago Press, 1941), pp. 18–31. He says (pp. 29, 30):

> "This is not to suggest that conscientious scruples can stand against all compulsion to do positive acts. Quite the contrary. The question is one of degree. I should think that

it requires more justification to compel a man or child to commit what he regards as sin than to restrict him in the areas in which he can practice what he regards as a command of the Lord. The public need should be pretty clear if it is to override conscientious objections against performing positive acts. The public need for armed defense may well be regarded as the most pressing public need of all. The public need for coerced and insincere saluting of the flag by little children seems to me to be trivial, and the effort to coerce it seems to me likely to be self-defeating. . . . .

"The dissent exposes the deficiencies in this particular compulsion of the young and points to alternative and better ways of attaining the very ends so strongly emphasized in the opinion of the majority. Clearly a contrary decision would have been no threat of the danger of making the state too weak to maintain its own existence."

Professor Robert E. Cushman of Cornell University, "Constitutional Law in 1939-40," 35 Am. Pol. Sci. Rev. 250, 271 (1941).

"[The majority opinion] falls far short of proving that national unity or any other desirable result will come from compelling school children publicly to affirm unfelt loyalties. All of the eloquence by which the majority extol the ceremony of flag saluting as a free expression of patriotism turns sour when used to describe the brutal compulsion which requires a sensitive and conscientious child to stultify himself in public."

W. G. Fennell, "The 'Reconstructed Court' and Religious Freedom: The Gobitis Case in Retrospect," 19 N.Y. Univ. L.Q. Rev. 31, 47 (1941).

"To exercise care in seeing that no legislation is permitted to stand which threatens the processes whereby political changes may ordinarily be effected is necessary, but alone it is not enough. . . . It is in such situations where prejudice against minorities curtails the operation of ordinary political processes that the Supreme Court has a duty to scrutinize even more carefully legislation which violates the rights of religious or racial minorities. . . .

"If the . . . [Court] continues to adhere in cases involving religious liberty to the doctrine of the majority in the *Gobitis* case, the scope of the state police power will be immeasurably enhanced and religious liberty will be at the mercy of shifting political majorities. It is to the lasting credit of the new Chief Justice that he comprehended that the Constitution expresses more than the conviction that democratic processes must be preserved at all costs; it is also an expression of faith and a command *which government itself must obey* that freedom of mind and spirit must be preserved."

Father Joseph T. Tinnelly, C.M., in 15 St. John's L. Rev. 95, 97 (1940) (it will be remembered that Jehovah's witnesses are bitter opponents of the Catholic Church).

"It is conceded that there may be times when the government may lawfully demand a public and external manifestation of the loyalty of its citizens. But it has no right, in the face of religious protests, to demand that that manifestation assume a particular, arbitrary form, when some other and religiously unobjectionable form would serve its purpose equally well. If national unity may be attained and freedom of conscience left uninfringed by the use of means other than the flag salute, those means should be used. [A footnote refers to the fact that religious objections to the customary swearing of witnesses are respected by the provision of the alternative method of affirmation.] . . . Patriotism and loyalty were not born in this country with the enactment of the first flag salute statute and the educational system which cannot foster them without infringing liberty of conscience is on the verge of pedagogical bankruptcy.

"To be sure, national unity, freedom and security are fostered by external marks of respect for the flag which symbolizes them. But they are, nevertheless, independent of these acts. To forget this fact is to risk falling into a dangerous formalism; it is to confuse the symbol with the thing symbolized; the shadow with the reality; flag waving with patriotism. The patriotism of the Gobitis children is not on trial. The lower courts found that there was no question of their substantial loyalty. And when we have the substance of loyalty we can well afford to overlook the children's refusal to externalize it by some accidental and

arbitrary form to which they objected on religious grounds. The greater danger lies in false professions of loyalty; the undetected enemy saluting the flag he plans to destroy. There seems to be no valid reason, then, for the denial to the Gobitis children of their freedom of conscience and the compulsory flag salute would appear to be an unjustified and unconstitutional use of the police power."

The opinion of the present Chief Justice is also approved by the following:

1 Bill of Rights Rev. 267 (1941).

H. G. Balter, "Freedom of Religion interpreted . . ." 15 Cal. St. Bar J. 161 (1940).

14 Univ. Cincinnati L. Rev. 444; *id.* 570, 571 (1940).

26 Cornell L. Q. 127 (1940).

4 Univ. Detroit L. J. 38 (1940).

Dean Ignatius M. Wilkinson of Fordham Law School, "Some Aspects of the Constitutional Guarantees of Civil Liberty," 11 Fordham L. Rev. 50 (1942).

29 Georgetown L. J. 112 (1940).

9 Internat. Juridical Assn. Bull. 1 (1940).

T. H. Skemp, "Freedom of Religious Worship," 25 Marquette L. Rev. 19 (1940).

39 Michigan L. Rev. 149 (1940).

6 Missouri L. Rev. 106 (1941).

18 N. Y. Univ. L. Q. Rev. 124 (1940).

Professor Charles E. Carpenter, Southern California Law School, in 14 Univ. So. Cal. L. Rev. 56 (1940).

14 Univ. So. Cal. L. Rev. 73 (1940).

15 Wash. L. Rev. 265 (1940).

J. R. Green, "Liberty under the Fourteenth Amendment," 27 Wash. Univ. L. Q. 497 (1942).

Only two law reviews have been found since the Gobitis case which favor constitutionality:

9 Jo. Bar Assn. of Kansas 276 (1941) [but compare the later Kansas decision stated *infra* p. 23].

14 Temple L. Q. 545 (1940).

The remaining discussions of the Gobitis case in legal periodicals take no position on either side:

C. G. Galston, "Conscription of the Mind in Support of the Bill of Rights," 1 Bill of Rights Rev. 269 (1941).

3 Ga. Bar J. No. 2, p. 66 (Nov. 1940). The reversed decision by the Circuit Court of Appeals was approved in 2 *id.* No. 4, p. 74 (May, 1940).

H. Wright, "Religious Liberty under the Constitution of the United States," 27 Va. L. Rev. 75 (1940).

To complete the picture of law review opinion, we may mention that several reviews which did not discuss the decision of the Court in the Gobitis case had already opposed the validity of the compulsory flag-salute in reviewing the case below or state cases.

20 Boston Univ. L. Rev. 356 (1940).

9 Brooklyn L. Rev. 205 (1940).

51 Harv. L. Rev. 1418 (1938).

23 Ia. L. Rev. 424 (1938).

F. W. Grinnell, "Children, the Bill of Rights and the American Flag," 24 Mass. L.Q.No.2, p. 1 (April-June 1939), *id.* No. 3, p. 1 (July-Sept. 1939), *id.* No. 4, p. 18 (Oct.-Dec. 1939).

23 Minn. L. Rev. 247 (1939).

74 New York L. Rev. 4 (1940).

18 Ore. L. Rev. 122 (1939).

86 Univ. Pa. L. Rev. 431 (1938).

2 Univ. Pittsburgh L. Rev. 206 (1936).

12 Rocky Mt. L. Rev. 202 (1940).

By contrast only two law reviews upheld the compulsory flag-salute in these earlier discussions:

8 Geo. Wash. L. Rev. 1094 (1940).

Professor E. M. Million of University of Idaho Law School, "Validity of Compulsory Flag Salutes in Public Schools," 28 Ky. L.J. 306 (1940) (questioning wisdom of compulsion).

The following law reviews were non-committal:

6 Kans. City L. Rev. 217 (1938).

14 Notre Dame Lawy. 115 (1938).

2 Law Journal of the Student Bar Assn., Ohio State Univ., 151 (1936) (questioning wisdom of regulation).

2. *The continued enforcement of the flag salute against children with religious scruples, which the* Gobitis *decision permitted, has been harmful to religious liberty.*

The decision in the *Gobitis* case merely held that the children could be expelled from a public school for refusing to salute the flag. It did not say what was to happen to them afterwards. But the decision left the children and their parents in a dilemma. Unless they were wealthy enough to send them to a private school, what was to be done? If the children went to another public school, they would merely suffer another expulsion. If they stayed at home, the parents would be prosecuted and imprisoned. Furthermore, statutes could easily be construed to make the expelled children juvenile offenders for their disobedience of a valid school regulation. The line is very thin between wrongdoing which deserves expulsion from a public school and wrongdoing which deserves commitment to a reform school. The parents too became liable to prosecution in some states for not returning their children to the very public school from which they had been expelled. Attempts have even been made to remove children from the custody of their parents on the ground of unfitness to bring them up.[11]

[11] See Fennell, *op. cit. supra*, 19 N.Y.U.L.Q. Rev. at 42; Plaintiff's Bill of Complaint, Record pp. 8-10; "The *Gobitis* Case in Retrospect," 1 Bill of Rts. Rev. 267

Some of these harsh proceedings were checked by court decisions, as we shall show, often because of some technical loophole in the school-laws; but for every parent or child thus judicially rescued there were possibly many more who went to jail or reform school because the local statute offered no hopeful loophole or because the family was too poor to resort to the courts.

Although the decision of this Court did not go so far as to send children to reform school or their fathers to jail, nevertheless the *Gobitis* decision by sanctioning expulsion made it easy for school boards to take the first step in a process which would naturally end in imprisoning somebody unless the board was willing to let the law become a dead-letter. And nothing in the decision provides a safeguard against the incarceration of father and child. Professor Thomas Reed Powell describes the whole situation:[12]

> "For the inanity of thinking that the ancient Hebrews gave or had authority to give any command not to salute the American flag, I have no real respect. Yet for little children I have great sympathy, however misguided the teachings and compulsions of their simple-minded, unintelligent parents. For the folly of excluding them from the benefits of public education I have nothing but contempt, on the very basis of the hopes of making them loyal Americans and of promoting national unity and patriotism. To commit them to institutions for the wayward and make them scholars in the schools of vice is to be guilty of an outrage that would make my blood boil. The decision under review does not sanction that . . . I cannot believe that the Supreme Court will permit such degradation and disgrace, although it left the Gobitis children to such poor and meager instruction as impecunicus parents can provide, and it refrained from caveats that would distinguish other penalties from that of expulsion from public schools."

(1941). The actual operation of the compulsory flag salute with its attendant criminal proceedings is fully reviewed by Professor E. M. Million of Idaho University College of Law, 28 Ky. L.J. 306 (1940), written before the Gobitis case.

[12] *Op. cit. supra* p. 13 of this brief, at p. 28.

The truth is that this chaotic situation is bound to continue so long as the *Gobitis* decision stands. The only lawful ways out of the dilemma created by the compulsory flag salute for a family of Jehovah's witnesses are (a) compliance with the salute regulation, which is for them a deadly sin; and (b) a private school for which these persons, largely working people, cannot pay. If the sect provides its own school, this means tearing the children from home for an education inferior to that in the public schools. All other ways out are illegal and lead straight to jail if the compulsory salute law is worth enforcing.

Since no one benefits from a continuance of this chaos, there seems to be little public good to justify the prolongation of interference with religious liberty.

3. *State courts, instead of being influenced by the actual decision in the* Gobitis *case, have tended to follow the reasoning of the present Chief Justice.*

The three years which have elapsed since the *Gobitis* case have shown an extraordinary preponderance of professional opinion, set forth under heading 1 of this brief, that the opinion of the present Chief Justice was sound; and there has also been a striking desire on the part of courts to follow that opinion. In addition to the decision by the three-judge district court in the case at bar, this tendency has been exhibited in state courts. Before the *Gobitis* case a large number of state courts of last resort had upheld the constitutionality of the compulsory flag salute, whereas since the publication of the opinion of the present Chief Justice not a single state decision in a court of last resort has been found which sustains the expulsion of a child from public schools for refusing on religious grounds to salute the flag. States which previously favored constitutionality have continued to do so, but no new state has been added to the list. The trend has been in the opposite direction. While school authorities have been active in enforcing the compulsory flag salute by expulsions and prosecutions of parents and children, yet judges, whenever they had the opportunity to review a case, have taken a much more lenient attitude toward the dissenting

children and their parents. The state court cases fall into two groups. The first group has kept the enforcement of the compulsory flag salute within narrow limits, and the second group has prevented its enforcement altogether.

In the first group of state cases children have been expelled from school for refusing to salute the flag, but the validity of this expulsion had either been settled by a previous decision or was not before the court. Instead, the court had to consider the question whether the school authorities could follow up the expulsion by sending the child to a reform school as a delinquent juvenile or by prosecuting the father for failing to send his child to public school. The following cases quashed such prosecutions:

Commonwealth v. *Johnson*, 309 Mass. 476, 35 N.E. 2d 801 (1941).

Although the Massachusetts statutes had previously been construed to permit the expulsion of the child from school, such exclusion was held not to imply such wrongdoing that the child could be committed to a county training school as a habitual offender. This severe penalty should not be imposed in the absence of express statutory provisions therefor. The constitutional question was expressly left aside.

State v. *Lefebvre* (N.H.), 20 A. 2d 185 (1941).

Children expelled from school for refusal to salute the flag had been adjudged delinquent and been committed to the Industrial School for their minorities. A powerful opinion by Judge Page refused to let family life be broken up and discharged the children, expressly relying on the opinion of the present Chief Justice.

Matter of Jones, 175 Misc. 451, 24 N.Y.S. 2d 10 (1940), same point.

Re Reed, 262 App. Div. 814, 30 N.Y.S. 2d 702 (1941), same point.

Commonwealth v. *Nemchick*, Court of Quarter Sessions, Luzerne County, Pa. (Nov. 20, 1942), unreported.

In Pennsylvania, the very state where the *Gobitis* case arose, the conviction of a mother for failure to have her expelled children attend school was reversed. The decision rested partly on the fact that the school authorities did not

give the required written notice three days before proceeding against her; but the court also held that the entire regulation prescribing the compulsory flag salute was invalidated by the Act of Congress of June 22, 1942, quoted in the Introduction in this brief.

Bolling v. *Superior Court for Clallam County*, Supreme Court of Washington (January 29, 1943), not yet reported.

Children of Jehovah's witnesses were expelled from school for refusal to salute the flag. The parents had no other means of educating them. The children were brought before the juvenile court as delinquent and declared to be wards of the court. They were taken away from their parents on a finding that the parents had neglected and refused to provide and permit proper training and education, and were placed in charge of their older sister. The Supreme Court of Washington issued a writ of prohibition to prevent the enforcement of this order, holding it to violate the Fourteenth Amendment, the Joint Resolution of Congress quoted *supra* page 3, and Amendment 4 to the Washington Constitution. The court, through Judge Beals, relied on the opinion of the former Chief Justice, which was quoted at length, and expressed entire agreement with the decision of the District Court in the case at bar. Although the validity of the expulsions was not before the court, the reasoning of the opinion is completely opposed to any enforcement of the compulsory flag salute against these children.

The material portion of the Constitution of the State of Washington, Amendment 4, reads: "Absolute freedom of conscience in all matters of religious sentiment, belief and worship, shall be guaranteed to every individual, and no one shall be molested or disturbed in person or property on account of religion; but the liberty of conscience hereby secured shall not be so construed as to excuse acts of licentiousness or justify practices inconsistent with the peace and safety of the state. . . ."

The preceding cases leave the children and their parents safely at home, although the children remain deprived of any education.[12a] The cases now to be considered reached the still

[12a] But see State v. Davis (Ariz.) 120 P 2d 808 (1942) as to criminality of parents for instructing their children.

more desirable result of restoring the children to their normal status in a public school.

State v. *Smith*, 155 Kans. 588, 127 P. 2d 518 (1942).

In reversing a criminal prosecution against the parents of expelled children, the Supreme Court of Kansas expressly invalidated the earliest of all the compulsory flag salute statutes, holding that it could not be constitutionally construed to support the expulsion of children from school if they refused on religious grounds to participate in the ceremony. Religious liberty was held to receive a wider protection from the Kansas Bill of Rights than under the national Bill of Rights as construed in the Gobitis case. The Kansas Bill of Rights, § 7, reads:

"The right to worship God according to the dictates of conscience shall never be infringed; nor shall any person be compelled to attend or support any form of worship; nor shall any control or interference with the rights of conscience be permitted, nor any preference given by law to any religious establishment or mode of worship. No religious test or property qualification shall be required for any office of public trust, nor for any vote at any election, nor shall any person be incompetent to testify on account of religious belief."

In Minnesota a District Court judge held that the expulsion of children from school for refusing on religious grounds to salute the flag violated the First and Fourteenth Amendments and also paragraph 16 of the Minnesota Bill of Rights.

Braun v. *Skustad*, District Court for the Eleventh Judicial District, St. Louis County, Minnesota (December 12, 1942).

We respectfully submit that liberty of religion under the First and Fourteenth Amendments should have the same breadth as under the more detailed constitutional provisions of Kansas, Minnesota, and Washington.

Thus the three years since the Gobitis case have supplied much evidence as to the actual operation of the compulsory flag

salute. The nature of most of the recent cases has obliged state judges to focus their attention upon what the enforcement of the law does to these children and their parents, rather than upon what it is supposed to do to the nation. The state courts have had before them children, otherwise loyal and well behaved, who had been rendered stubborn and rebellious at a critical time in their lives when steady growth and freedom from unnecessary emotional strains is essential. Their education has been demoralized by the expulsions which this Court sanctioned; some get piecemeal instructions from their parents; some are sent away to a distant sectarian school; others are torn from their homes and committed for the rest of their adolescence to institutions for juvenile delinquents. The state judges have had to deal with fathers and even mothers who have also been torn from their homes and sent to jail for no other crime than teaching their simple faith to their own offspring. These ugly facts have made glowing abstractions about loyalty and national unity seem increasingly remote from the enforced salute. When men see how enforcement of the flag salute against a conscientious child disunites his school and his family, they doubt the reasonableness of its power to unite the nation.

CONCLUSION

The regulation forcing the children of these plaintiffs to engage in a ceremony which they believe to be sinful is an interference with religious liberty. We recognize that some interferences with religious liberty are constitutional, for it is not unlimited. The value of religious liberty must be weighed in the scales against the value of the conduct which the law requires. It is a problem of balancing. But this Court in view of the constitutional mandate must do this balancing itself. Religious liberty has been the cherished possession of small minorities, and would lose all its safeguards were it entrusted to the judgment of majorities in legislatures or administrative bodies.[13]

Everybody recognizes that national unity is a great ideal, but the whole question is whether national unity has anything to do with the case. What is to be weighed in the scales is the value of the conduct which the law requires. The law does not require national unity and it could not. National unity is a creation of the spirit, and the wind of the spirit "bloweth where it listeth." What the law does require is the salute of the flag by children who regard such saluting as a damnable sin. What must be weighed is the value of that ceremony as performed *by these children*—not by some other children who welcome it but by these children who detest it as forbidden by the Word of God. On that alone should the attention of the Court be concentrated. Everything then turns on the question whether there is any *reasonable* connection between the enforced participation of the children in a sinful ceremony and the promotion of national unity. The more one looks squarely at facts and probabilities, the better he can see that there never was any *reasonable* connection. The means are wholly unfit to attain the end which we all desire. As the present Chief Justice observes:[14]

> "And while such expressions of loyalty, when voluntarily given, may promote national unity, it is quite another matter to say that their compulsory expression by children

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[13] See Stone, J., Minersville School District *v.* Gobitis, 310 U.S. at 604-605.

[14] Minersville School District *v.* Gobitis, 310 U.S. at 605.

in violation of their own and their parents' religious convictions can be regarded as playing so important a part in our national unity as to leave school boards free to exact it despite the constitutional guarantee of freedom of religion."

The nation which survived Valley Forge and the dark days of the Civil War without compulsory flag salutes will not go to rack and ruin because a few children fail to participate in this novel ceremony on account of their religious beliefs. We respectfully urge the Court to adopt the view of the present Chief Justice that their absence will not endanger the safety of the nation. Robert Frost, the poet, put this whole case in a nutshell when he recently said in reply to the observation that Mr. Justice Stone's opinion showed no such fears:

"Yes, he knew the flag was all right, any way."

Accordingly, the Committee submits that the judgment of the lower court should be affirmed.

Respectfully submitted.

THE COMMITTEE ON THE BILL OF RIGHTS, OF THE AMERICAN BAR ASSOCIATION

DOUGLAS ARANT, *Chairman*
(of the Alabama Bar)

JULIUS BIRGE
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BASIL O'CONNOR
(of the New York Bar)

Oct. 7, 1943 From 4 parts ; dissent.

SUPREME COURT OF THE UNITED STATES.

No. 591.—October Term, 1942.

The West Virginia State Board of Education, etc., et al., Appellants, *vs.* Walter Barnette, Paul Stull and Lucy McClure.	On Appeal from the District Court of the United States for the Southern District of West Virginia.

[June 14, 1943.]

Mr. Justice Jackson delivered the opinion of the Court.

Following the decision by this Court on June 3, 1940, in *Minersville School District* v. *Gobitis*, 310 U. S. 586, the West Virginia legislature amended its statutes to require all schools therein to conduct courses of instruction in history, civics, and in the Constitutions of the United States and of the State "for the purpose of teaching, fostering and perpetuating the ideals, principles and spirit of Americanism, and increasing the knowledge of the organization and machinery of the government." Appellant Board of Education was directed, with advice of the State Superintendent of Schools, to "prescribe the courses of study covering these subjects" for public schools. The Act made it the duty of private, parochial and denominational schools to prescribe courses of study "similar to those required for the public schools."[1]

The Board of Education on January 9, 1942, adopted a resolution containing recitals taken largely from the Court's *Gobitis* opinion and ordering that the salute to the flag become "a regular part of the program of activities in the public schools," that all teachers and pupils "shall be required to participate in the

[1] § 1734, West Virginia Code (1941 Supp.):

"In all public, private, parochial and denominational schools located within this state there shall be given regular courses of instruction in history of the United States, in civics, and in the constitutions of the United States and of the State of West Virginia, for the purpose of teaching, fostering and perpetuating the ideals, principles and spirit of Americanism, and increasing the knowledge of the organization and machinery of the government of the United

salute honoring the Nation represented by the Flag; provided, however, that refusal to salute the Flag be regarded as an Act of insubordination, and shall be dealt with accordingly."[2]

The resolution originally required the "commonly accepted salute to the Flag" which it defined. Objections to the salute as "being too much like Hitler's" were raised by the Parent and Teachers Association, the Boy and Girl Scouts, the Red Cross, and the Federa-

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States and of the state of West Virginia. The state board of education shall, with the advice of the state superintendent of schools, prescribe the courses of study covering these subjects for the public elementary and grammar schools, public high schools and state normal schools. It shall be the duty of the officials or boards having authority over the respective private, parochial and denominational schools to prescribe courses of study for the schools under their control and supervision similar to those required for the public schools."

[2] The text is as follows:

"WHEREAS, The West Virginia State Board of Education holds in highest regard those rights and privileges guaranteed by the Bill of Rights in the Constitution of the United States of America and in the Constitution of West Virginia, specifically, the first amendment to the Constitution of the United States as restated in the fourteenth amendment to the same document and in the guarantee of religious freedom in Article III of the Constitution of this State, and

"WHEREAS, The West Virginia State Board of Education honors the broad principle that one's convictions about the ultimate mystery of the universe and man's relation to it is placed beyond the reach of law; that the propagation of belief is protected whether in church or chapel, mosque or synagogue, tabernacle or meeting house; that the Constitutions of the United States and of the State of West Virginia assure generous immunity to the individual from imposition of penalty for offending, in the course of his own religious activities, the religious views of others, be they a minority or those who are dominant in the government, but

"WHEREAS, The West Virginia State Board of Education recognizes that the manifold character of man's relations may bring his conception of religious duty into conflict with the secular interests of his fellowman; that conscientious scruples have not in the course of the long struggle for religious toleration relieved the individual from obedience to the general law not aimed at the promotion or restriction of the religious beliefs; that the mere possession of convictions which contradict the relevant concerns of political society does not relieve the citizen from the discharge of political responsibility, and

"WHEREAS, The West Virginia State Board of Education holds that national unity is the basis of national security; that the flag of our Nation is the symbol of our National Unity transcending all internal differences, however large within the framework of the Constitution; that the Flag is the symbol of the Nation's power; that emblem of freedom in its truest, best sense; that it signifies government resting on the consent of the governed, liberty regulated by law, protection of the weak against the strong, security against the exercise of arbitrary power, and absolute safety for free institutions against foreign aggression, and

"WHEREAS, The West Virginia State Board of Education maintains that the public schools, established by the legislature of the State of West Virginia under the authority of the Constitution of the State of West Virginia and supported by taxes imposed by legally constituted measures, are dealing with the formative period in the development in citizenship that the

tion of Women's Clubs.[3] Some modification appears to have been made in deference to these objections, but no concession was made to Jehovah's Witnesses.[4] What is now required is the "stiff-arm" salute, the saluter to keep the right hand raised with palm turned up while the following is repeated: "I pledge allegiance to the Flag of the United States of America and to the Republic for which it stands; one Nation, indivisible, with liberty and justice for all."

Failure to conform is "insubordination" dealt with by expulsion. Readmission is denied by statute until compliance. Meanwhile the expelled child is "unlawfully absent"[5] and may be proceeded against as a delinquent.[6] His parents or guardians are

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Flag is an allowable portion of the program of schools thus publicly supported.

"Therefore, be it RESOLVED, That the West Virginia Board of Education does hereby recognize and order that the commonly accepted salute to the Flag of the United States—the right hand is placed upon the breast and the following pledge repeated in unison: 'I pledge allegiance to the Flag of the United States of America and to the Republic for which it stands; one Nation, indivisible, with liberty and justice for all'—now becomes a regular part of the program of activities in the public schools, supported in whole or in part by public funds, and that all teachers as defined by law in West Virginia and pupils in such schools shall be required to participate in the salute honoring the Nation represented by the Flag; provided, however, that refusal to salute the Flag be regarded as an act of insubordination, and shall be dealt with accordingly."

[3] The National Headquarters of the United States Flag Association takes the position that the extension of the right arm in this salute to the flag is not the Nazi-Facist salute, "although quite similar to it. In the Pledge to the Flag the right arm is extended and raised, palm UPWARD, whereas the Nazis extend the arm practically *straight to the front* (the finger tips being about even with the eyes), *palm* DOWNWARD, and the Fascists do the same except they raise the arm slightly higher." James A. Moss, The Flag of the United States: Its History and Symbolism (1914) 108.

[4] They have offered in lieu of participating in the flag salute ceremony "periodically and publicly" to give the following pledge:

"I have pledged my unqualified allegiance and devotion to Jehovah, the Almighty God, and to His Kingdom, for which Jesus commands all Christians to pray.

"I respect the flag of the United States and acknowledge it as a symbol of freedom and justice to all.

"I pledge allegiance and obedience to all the laws of the United States that are consistent with God's law, as set forth in the Bible."

[5] § 1851(1), West Virginia Code (1941 Supp.):

"If a child be dismissed, suspended, or expelled from school because of refusal of such child to meet the legal and lawful requirements of the school and the established regulations of the county and/or state board of education, further admission of the child to school shall be refused until such requirements and regulations be complied with. Any such child shall be treated as being unlawfully absent from school during the time he refuses to comply with such requirements and regulations, and any person having legal or actual control of such child shall be liable to prosecution under the provisions of this article for the absence of such child from school."

[6] § 4904(4), West Virginia Code (1941 Supp.).

liable to prosecution,[7] and if convicted are subject to fine not exceeding $50 and jail term not exceeding thirty days.[8]

Appellees, citizens of the United States and of West Virginia, brought suit in the United States District Court for themselves and others similarly situated asking its injunction to restrain enforcement of these laws and regulations against Jehovah's Witnesses. The Witnesses are an unincorporated body teaching that the obligation imposed by law of God is superior to that of laws enacted by temporal government. Their religious beliefs include a literal version of Exodus, Chapter 20, verses 4 and 5, which says: "Thou shalt not make unto thee any graven image, or any likeness of anything that is in heaven above, or that is in the earth beneath, or that is in the water under the earth; thou shalt not bow down thyself to them nor serve them." They consider that the flag is a "image" within this command. For this reason they refuse to salute it.

Children of this faith have been expelled from school and are threatened with exclusion for no other cause. Officials threaten to send them to reformatories maintained for criminally inclined juveniles. Parents of such children have been prosecuted and are threatened with prosecutions for causing delinquency.

The Board of Education moved to dismiss the complaint setting forth these facts and alleging that the law and regulations are an unconstitutional denial of religious freedom, and of freedom of speech, and are invalid under the "due process" and "equal protection" clauses of the Fourteenth Amendment to the Federal Constitution. The cause was submitted on the pleadings to a District Court of three judges. It restrained enforcement as to the plaintiffs and those of that class. The Board of Education brought the case here by direct appeal.[9]

This case calls upon us to reconsider a precedent decision, as the Court throughout its history often has been required to do.[10] Before turning to the *Gobitis* case, however, it is desirable to notice certain characteristics by which this controversy is distinguished.

appellees

The freedom asserted by these ~~respondents~~ does not bring them into collision with rights asserted by any other individual. It is

[7] See Note 5, *supra*.

[8] §§ 1847, 1851, West Virginia Code (1941 Supp.).

[9] § 237 of the Judicial Code, 28 U. S. C. § 380.

[10] See authorities cited in Helvering v. Griffiths, (No. 467, decided March 1, 1943) p. 21, note 52.

such conflicts which most frequently require intervention of the State to determine where the rights of one end and those of another begin. But the refusal of these persons to participate in the ceremony does not interfere with or deny rights of others to do so. Nor is there any question in this case that their behavior is peaceable and orderly. The sole conflict is between authority and rights of the individual. The State asserts power to condition access to public education on making a prescribed sign and profession and at the same time to coerce attendance by punishing both parent and child. The latter stand on a right of self-determination in matters that touch individual opinion and personal attitude.

As the present CHIEF JUSTICE said in dissent in the *Gobitis* case, the State may "require teaching by instruction and study of all in our history and in the structure and organization of our government, including the guaranties of civil liberty, which tend to inspire patriotism and love of country." 310 U. S. at 604. Here, however, we are dealing with a compulsion of students to declare a belief. They are not merely made acquainted with the flag salute so that they may be informed as to what it is or even what it means. The issue here is whether this slow and easily neglected[11] route to aroused loyalties constitutionally may be short-cut by substituting a compulsory salute and slogan.[12] This issue is not prejudiced by the Court's previous holding that where a State

[11] See the nation-wide survey of the study of American history conducted by the New York Times, the results of which are published in the issue of June 21, 1942, and are there summarized on p. 1, col. 1, as follows:

"82 per cent of the institutions of higher learning in the United States do not require the study of United States history for the undergraduate degree. Eighteen per cent of the colleges and universities require such history courses before a degree is awarded. It was found that many students complete their four years in college without taking any history courses dealing with this country.

"Seventy-two per cent of the colleges and universities do not require United States history for admission, while 28 per cent require it. As a result, the survey revealed, many students go through high school, college and then to the professional or graduate institution without having explored courses in the history of their country.

"Less than 10 per cent of the total undergraduate body was enrolled in United States history classes during the Spring semester just ended. Only 8 per cent of the freshman class took courses in United States history, although 20 per cent was enrolled in European or world history courses."

[12] The Resolution of the Board of Education did not adopt the flag salute because it was claimed to have educational value. It seems to have been concerned with promotion of national unity (see footnote 2), which justification is considered later in this opinion. No information as to its educational

without compelling attendance, extends college facilities to pupils who voluntarily enroll, it may prescribe military training as part of the course without offense to the Constitution. It was held that those who take advantage of its opportunities may not on ground of conscience refuse compliance with such conditions. *Hamilton* v. *Regents*, 293 U. S. 245. In the present case attendance is not optional. That case is also to be distinguished from the present one because, independently of college privileges or requirements, the State has power to raise militia and impose the duties of service therein upon its citizens.

There is no doubt that, in connection with the pledges, the flag salute is a form of utterance. Symbolism is a primitive but effective way of communicating ideas. The use of an emblem or flag to symbolize some system, idea, institution, or personality, is a short cut from mind to mind. Causes and nations, political parties, lodges and ecclesiastical groups seek to knit the loyalty of their followings to a flag or banner, a color or design. The State announces rank, function, and authority through crowns and maces, uniforms and black robes; the church speaks through the Cross, the Crucifix, the altar and shrine, and clerical raiment. Symbols of State often convey political ideas just as religious symbols come to convey theological ones. Associated with many of these symbols are appropriate gestures of acceptance or respect: a salute, a bowed or bared head, a bended knee. A person gets from a symbol the meaning he puts into it, and what is one man's comfort and inspiration is another's jest and scorn.

Over a decade ago Chief Justice Hughes led this Court in holding that the display of a red flag as a symbol of opposition by peaceful and legal means to organized government was protected by the free speech guaranties of the Constitution. *Stromberg* v. *California*, 283 U. S. 359. Here it is the State that employs a flag as a symbol of adherence to government as presently organized. It requires the individual to communicate by word and sign his acceptance of the political ideas it thus bespeaks. Objection to

aspect is called to our attention except Olander, Children's Knowledge of the Flag Salute, 35 Journal of Educational Research, 300, 305, which sets forth a "study of the ability of a large and representative number of children to remember and state the meaning of the flag salute which they recited each day in school. His conclusion was that it revealed "a rather pathetic picture of our attempts to teach children not only the words but the meaning of our Flag Salute".

this form of communication when coerced is an old one, well known to the framers of the Bill of Rights.[13]

It is also to be noted that the compulsory flag salute and pledge requires affirmation of a belief and an attitude of mind. It is not clear whether the regulation contemplates that pupils forego any contrary convictions of their own and become unwilling converts to the prescribed ceremony or whether it will be acceptable if they simulate assent by words without belief and by a gesture barren of meaning. It is now a commonplace that censorship or suppression of expression of opinion is tolerated by our Constitution only when the expression presents a clear and present danger of action of a kind the State is empowered to prevent and punish. It would seem that involuntary affirmation could be commanded only on even more immediate and urgent grounds than silence. But here the power of compulsion is invoked without any allegation that remaining passive during a flag salute ritual creates a clear and present danger that would justify an effort even to muffle expression. To sustain the compulsory flag salute we are required to say that a Bill of Rights which guards the individual's right to speak his own mind, left it open to public authorities to compel him to utter what is not in his mind.

Whether the First Amendment to the Constitution will permit officials to order observance of ritual of this nature does not depend upon whether as a voluntary exercise we would think it to be good, bad or merely innocuous. Any credo of nationalism is likely to include what some disapprove or to omit what others think essential, and to give off different overtones as it takes on different accents or interpretations.[14] If official power exists to coerce acceptance of any patriotic creed, what it shall contain

[13] Early Christians were frequently persecuted for their refusal to participate in ceremonies before the statue of the emperor or other symbol of imperial authority. The story of William Tell's sentence to shoot an apple off his son's head for refusal to salute a bailiff's hat is an ancient one. 21 Encyclopedia Britannica (14th ed.) 911-912. The Quakers, William Penn included, suffered punishment rather than uncover their heads in deference to any civil authority. Braithwaite, The Beginnings of Quakerism (1912) 209, 229-230, 232-233, 447, 451; Fox, Quakers Courageous (1941) 113.

[14] For example: Use of "Republic," if rendered to distinguish our government from a "democracy," or the words "one Nation," if intended to distinguish it from a "federation," open up old and bitter controversies in our political history; "liberty and justice for all," if it must be accepted as descriptive of the present order rather than an ideal, might to some seem an overstatement.

cannot be decided by courts, but must be largely discretionary with the ordaining authority, whose power to prescribe would no doubt include power to amend. Hence validity of the asserted power to force an American citizen publicly to profess any statement of belief or to engage in any ceremony of assent to one, presents questions of power that must be considered independently of any idea we may have as to the utility of the ceremony in question.

appellees'

Nor does the issue as we see it turn on one's possession of particular religious views or the sincerity with which they are held. While religion supplies ~~respondents~~ appellees' motive for enduring the discomforts of making the issue in this case, many citizens who do not share these religious views hold such a compulsory rite to infringe constitutional liberty of the individual.[15] It is not necessary to inquire whether non-conformist beliefs will exempt from the duty to salute unless we first find power to make the salute a legal duty.

The *Gobitis* decision, however, *assumed*, as did the argument in that case and in this, that power exists in the State to impose the flag salute discipline upon school children in general. The Court only examined and rejected a claim based on religious beliefs of immunity from an unquestioned general rule.[16] The question which underlies the flag salute controversy is whether such a ceremony so touching matters of opinion and political

[15] Cushman, Constitutional Law in 1939-40, 35 American Political Science Review 256, 271, observes: "All of the eloquence by which the majority extol the ceremony of flag saluting as a free expression of patriotism turns sour when used to describe the brutal compulsion which requires a sensitive and conscientious child to stultify himself in public." For further criticism of the opinion in the *Gobitis* case by persons who do not share the faith of the Witnesses see: Powell, Conscience and the Constitution, in Democracy and National Unity (University of Chicago Press, 1941) 1; Wilkinson, Some Aspects of the Constitutional Guarantees of Civil Liberty, 11 Fordham Law Review 50; Fennell, The "Reconstructed Court" and Religious Freedom: The Gobitis Case in Retrospect, 19 New York University Law Quarterly Review 31; Green, Liberty under the Fourteenth Amendment, 27 Washington University Law Quarterly 497; 9 International Juridical Association Bulletin 1; 39 Michigan Law Review 149; 15 St. John's Law Review 95.

[16] The opinion says "That the flag salute is an allowable portion of a school program *for those who do not invoke conscientious scruples* is *surely not debatable*. But for us to insist that, *though the ceremony may be required, exceptional immunity must be given to dissidents*, is to maintain that there is no basis for a legislative judgment that such an exemption might introduce elements of difficulty into the school discipline, might cast doubts in the minds of the other children which would themselves weaken the effect of the exercise." [Italics ours.] 310 U. S. at 599-600. And elsewhere the

attitude may be imposed upon the individual by official authority under powers committed to any political organization under our Constitution. We examine rather than assume existence of this power and, against this broader definition of issues in this case, re-examine specific grounds assigned for the *Gobitis* decision.

1. It was said that the flag-salute controversy confronted the Court with "the problem which Lincoln cast in memorable dilemma: 'Must a government of necessity be too *strong* for the liberties of its people, or too *weak* to maintain its own existence?'" and that the answer must be in favor of strength. *Minersville School District* v. *Gobitis*, *supra*, at 596.

We think these issues may be examined free of pressure or restraint growing out of such considerations.

It may be doubted whether Mr. Lincoln would have thought that the strength of government to maintain itself would be impressively vindicated by our confirming power of the state to expel a handful of children from school. Such oversimplification, so handy in political debate, often lacks the precision necessary to postulates of judicial reasoning. If validly applied to this problem, the utterance cited would resolve every issue of power in favor of those in authority and would require us to override every liberty thought to weaken or delay execution of their policies.

Government of limited power need not be anemic government. Assurance that rights are secure tends to diminish fear and jealousy of strong government, and by making us feel safe to live under it makes for its better support. Without promise of a limiting Bill of Rights it is doubtful if our Constitution could have mustered enough strength to enable its ratification. To enforce those rights today is not to choose weak government over strong government. It is only to adhere as a means of strength to individual freedom of mind in preference to officially disciplined uniformity for which history indicates a disappointing and disastrous end.

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question under consideration was stated, "When does the constitutional guarantee *compel exemption* from doing what society thinks necessary for the protection of some great common end, or from a penalty for conduct which appears dangerous to the general good?" [Italics ours.] *Id.* at 593. And again, ". . . whether school children, like the Gobitis children, must be *excused from conduct required of all the other children* in the promotion of national cohesion. . . ." [Italics ours.] *Id.* at 595.

The subject now before us exemplifies this principle. Free public education, if faithful to the ideal of secular instruction and political neutrality, will not be partisan or enemy of any class, creed, party, or faction. If it is to impose any ideological discipline, however, each party or denomination must seek to control, or failing that, to weaken the influence of the educational system. Observance of the limitations of the Constitution will not weaken government in the field appropriate for its exercise.

2. It was also considered in the *Gobitis* case that functions of educational officers in states, counties and school districts were such that to interfere with their authority "would in effect make us the school board for the country." *Id.* at 598.

The Fourteenth Amendment, as now applied to the States, protects the citizen against the State itself and all of its creatures—Boards of Education not excepted. These have, of course, important, delicate, and highly discretionary functions, but none that they may not perform within the limits of the Bill of Rights. That they are educating the young for citizenship is reason for scrupulous protection of Constitutional freedoms of the individual, if we are not to strangle the free mind at its source and teach youth to discount important principles of our government as mere platitudes.

Such Boards are numerous and their territorial jurisdiction often small. But small and local authority may feel less sense of responsibility to the Constitution, and agencies of publicity may be less vigilant in calling it to account. The action of Congress in making flag observance voluntary[17] and respecting the conscience of the objector in a matter so vital as raising the Army[18] contrasts sharply with these local regulations in matters relatively trivial to the welfare of the nation. There are village tyrants as well as village Hampdens, but none who acts under color of law is beyond reach of the Constitution.

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[17] § 7 of House Joint Resolution 359, approved December 22, 1942, 56 Stat. 1074, 36 U. S. C. (1942 Supp.) § 172, prescribes no penalties for nonconformity but provides:

"That the pledge of allegiance to the flag, 'I pledge allegiance to the flag of the United States of America and to the Republic for which it stands, one Nation indivisible, with liberty and justice for all', be rendered by standing with the right hand over the heart. However, civilians will always show full respect to the flag when the pledge is given by merely standing at attention, men removing the headdress . . . ."

[18] § 5 (g) of the Selective Training and Service Act of 1940, 50 U. S. C. (App.) § 305 (g).

3. The *Gobitis* opinion reasoned that this is a field "where courts possess no marked and certainly no controlling competence," that it is committed to the legislatures as well as the courts to guard cherished liberties and that it is constitutionally appropriate to "fight out the wise use of legislative authority in the forum of public opinion and before legislative assemblies rather than to transfer the contest to the judicial arena," since all the "effective means of inducing political changes are left free." *Id.* at 597-598, 600.

The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts. One's right to life, liberty, and property, to free speech, a free press, freedom of worship and assembly, and other fundamental rights may not be submitted to vote; they depend on the outcome of no elections.

In weighing arguments of the parties it is important to distinguish between the due process clause of the Fourteenth Amendment as an instrument for transmitting the principles of the First Amendment and those cases in which it is applied for its own sake. The test of legislation which collides with the Fourteenth Amendment, because it also collides with the principles of the First, is much more definite than the test when only the Fourteenth is involved. Much of the vagueness of the due process clause disappears when the specific prohibitions of the First become its standard. The right of a State to regulate, for example, a public utility may well include, so far as the due process test is concerned, power to impose all of the restrictions which a legislature may have a "rational basis" for adopting. But freedoms of speech and of press, of assembly, and of worship may not be infringed on such slender grounds. They are susceptible of restriction only to prevent grave and immediate danger to interests which the state may lawfully protect. It is important to note that while it is the Fourteenth Amendment which bears directly upon the State it is the more specific limiting principles of the First Amendment that finally govern this case.

Nor does our duty to apply the Bill of Rights to assertions of official authority depend upon our possession of marked competence in the field where the invasion of rights occurs. True, the task of translating the majestic generalities of the Bill of Rights,

conceived as part of the pattern of liberal government in the eighteenth century, into concrete restraints on officials dealing with the problems of the twentieth century, is one to disturb self-confidence. These principles grew in soil which also produced a philosophy that the individual was the center of society, that his liberty was attainable through mere absence of governmental restraints, and that government should be entrusted with few controls and only the mildest supervision over men's affairs. We must transplant these rights to a soil in which the *laissez-faire* concept or principle of non-interference has withered at least as to economic affairs, and social advancements are increasingly sought through closer integration of society and through expanded and strengthened governmental controls. These changed conditions often deprive precedents of reliability and cast us more than we would choose upon our own judgment. But we act in these matters not by authority of our competence but by force of our commissions. We cannot, because of modest estimates of our competence in such specialties as public education, withhold the judgment that history authenticates as the function of this Court when liberty is infringed.

4. Lastly, and this is the very heart of the *Gobitis* opinion, it reasons that "National unity is the basis of national security," that the authorities have "the right to select appropriate means for its attainment," and hence reaches the conclusion that such compulsory measures toward "national unity" are constitutional. *Id.* at 595. Upon the verity of this assumption depends our answer in this case.

National unity as an end which officials may foster by persuasion and example is not in question. The problem is whether under our Constitution compulsion as here employed is a permissible means for its achievement.

Struggles to coerce uniformity of sentiment in support of some end thought essential to their time and country have been waged by many good as well as by evil men. Nationalism is a relatively recent phenomenon but at other times and places the ends have been racial or territorial security, support of a dynasty or regime, and particular plans for saving souls. As first and moderate methods to attain unity have failed, those bent on its accomplishment must resort to an ever increasing severity. As governmental pressure toward unity becomes greater, so strife becomes more bitter as to whose unity it shall be. Probably no deeper division

of our pepole could proceed from any provocation than from finding it necessary to choose what doctrine and whose program public educational officials shall compel youth to unite in embracing. Ultimate futility of such attempts to compel coherence is the lesson of every such effort from the Roman drive to stamp out Christianity as a disturber of its pagan unity, the Inquisition, as a means to religious and dynastic unity, the Siberian exiles as a means to Russian unity, down to the fast failing efforts of our present totalitarian enemies. Those who begin coercive elimination of dissent soon find themselves exterminating dissenters. Compulsory unification of opinion achieves only the unanimity of the graveyard.

It seems trite but necessary to say that the First Amendment to our Constitution was designed to avoid these ends by avoiding these beginnings. There is no mysticism in the American concept of the State or of the nature or origin of its authority. We set up government by consent of the governed, and the Bill of Rights denies those in power any legal opportunity to coerce that consent. Authority here is to be controlled by public opinion, not public opinion by authority.

The case is made difficult not because the principles of its decision are obscure but because the flag involved is our own. Nevertheless, we apply the limitations of the Constitution with no fear that freedom to be intellectually and spiritually diverse or even contrary will disintegrate the social organization. To believe that patriotism will not flourish if patriotic ceremonies are voluntary and spontaneous instead of a compulsory routine is to make an unflattering estimate of the appeal of our institutions to free minds. We can have intellectual individualism and the rich cultural diversities that we owe to exceptional minds only at the price of occasional eccentricity and abnormal attitudes. When they are so harmless to others or to the State as those we deal with here, the price is not too great. But freedom to differ is not limited to things that do not matter much. That would be a mere shadow of freedom. The test of its substance is the right to differ as to things that touch the heart of the existing order.

If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith

therein. If there are any circumstances which permit an exception, they do not now occur to us.[19]

We think the action of the local authorities in compelling the flag salute and pledge transcends constitutional limitations on their power and invades the sphere of intellect and spirit which it is the purpose of the First Amendment to our Constitution to reserve from all official control.

The decision of this Court in *Minersville School District* v. *Gobitis* and the holdings of those few *per curiam* decisions which preceded and foreshadowed it are overruled, and the judgment enjoining enforcement of the West Virginia Regulation is

Affirmed.

Mr. Justice ROBERTS and Mr. Justice REED adhere to the views expressed by the Court in *Minersville School District* v. *Gobitis*, 310 U. S. 586, and are of the opinion that the judgment below should be reversed.

Mr. Justice BLACK and Mr. Justice DOUGLAS, concurring.

We are substantially in agreement with the opinion just read, but since we originally joined with the Court in the *Gobitis* case, it is appropriate that we make a brief statement of reasons for our change of view.

Reluctance to make the Federal Constitution a rigid bar against state regulation of conduct thought inimical to the public welfare was the controlling influence which moved us to consent to the *Gobitis* decision. Long reflection convinced us that although the principle is sound, its application in the particular case was wrong. *Jones* v. *Opelika*, 316 U. S. 584, 623. We believe that the statute before us fails to accord full scope to the freedom of religion secured to the appellees by the First and Fourteenth Amendments.

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[19] The Nation may raise armies and compel citizens to give military service. Selective Draft Law Cases, 245 U. S. 366. It follows, of course, that those subject to military discipline are under many duties and may not claim many freedoms that we hold inviolable as to those in civilian life.

The statute requires the appellees to participate in a ceremony aimed at inculcating respect for the flag and for this country. The Jehovah's Witnesses, without any desire to show disrespect for either the flag or the country, interpret the Bible as commanding, at the risk of God's displeasure, that they not go through the form of a pledge of allegiance to any flag. The devoutness of their belief is evidenced by their willingness to suffer persecution and punishment, rather than make the pledge.

No well ordered society can leave to the individuals an absolute right to make final decisions, unassailable by the State, as to everything they will or will not do. The First Amendment does not go so far. Religious faiths, honestly held, do not free individuals from responsibility to conduct themselves obediently to laws which are either imperatively necessary to protect society as a whole from grave and pressingly imminent dangers or which, without any general prohibition, merely regulate time, place or manner of religious activity. Decision as to the constitutionality of particular laws which strike at the substance of religious tenets and practices must be made by this Court. The duty is a solemn one, and in meeting it we cannot say that a failure, because of religious scruples, to assume a particular physical position and to repeat the words of a patriotic formula creates a grave danger to the nation. Such a statutory exaction is a form of test oath, and the test oath has always been abhorrent in the United States.

Words uttered under coercion are proof of loyalty to nothing but self-interest. Love of country must spring from willing hearts and free minds, inspired by a fair administration of wise laws enacted by the people's elected representatives within the bounds of express constitutional prohibitions. These laws must, to be consistent with the First Amendment, permit the widest toleration of conflicting viewpoints consistent with a society of free men.

Neither our domestic tranquillity in peace nor our martial effort in war depend on compelling little children to participate in a ceremony which ends in nothing for them but a fear of spiritual condemnation. If, as we think, their fears are groundless, time and reason are the proper antidotes for their errors. The ceremonial, when enforced against conscientious objectors, more likely to defeat than to serve its high purpose, is a handy implement for disguised religious persecution. As such, it is inconsistent with our Constitution's plan and purpose.

Mr. Justice MURPHY, concurring.

I agree with the opinion of the Court and join in it.

The controversy challenges an order of the State Board of Education which requires teachers and pupils to participate in the prescribed salute to the flag. For refusal to conform with the requirement the State law prescribes expulsion. The offender is required by law to be treated as unlawfully absent from school and the parent or guardian is made liable to prosecution and punishment for such absence. Thus not only is the privilege of public education conditioned on compliance with the requirement, but non-compliance is virtually made unlawful. In effect compliance is compulsory and not optional. It is the claim of appellees that the regulation is invalid as a restriction on religious freedom and freedom of speech, secured to them against State infringement by the First and Fourteenth Amendments to the Constitution of the United States.

A reluctance to interfere with considered state action, the fact that the end sought is a desirable one, the emotion aroused by the flag as a symbol for which we have fought and are now fighting again, all of these are understandable. But there is before us the right of freedom to believe, freedom to worship one's Maker according to the dictates of one's conscience, a right which the Constitution specifically shelters. Reflection has convinced me that as a judge I have no loftier duty or responsibility than to uphold that spiritual freedom to its farthest reaches.

The right of freedom of thought and of religion as guaranteed by the Constitution against State action includes both the right to speak freely and the right to refrain from speaking at all, except insofar as essential operations of government may require it for the preservation of an orderly society,—as in the case of compulsion to give evidence in court. Without wishing to disparage the purposes and intentions of those who hope to inculcate sentiments of loyalty and patriotism by requiring a declaration of allegiance as a feature of public education, or unduly belittle the benefits that may accrue therefrom, I am impelled to conclude that such a requirement is not essential to the maintenance of effective government and orderly society. To many it is deeply distasteful to join in a public chorus of affirmation of private belief. By some, including the members of this sect, it is apparently regarded as incompatible with a primary religious obli-

gation and therefore a restriction on religious freedom. Official compulsion to affirm what is contrary to one's religious beliefs is the antithesis of freedom of worship which, it is well to recall, was achieved in this country only after what Jefferson characterized as the "severest contests in which I have ever been engaged."[1]

I am unable to agree that the benefits that may accrue to society from the compulsory flag salute are sufficiently definite and tangible to justify the invasion of freedom and privacy that is entailed or to compensate for a restraint on the freedom of the individual to be vocal or silent according to his conscience or personal inclination. The trenchant words in the preamble to the Virginia Statute for Religious Freedom remain unanswerable: "... all attempts to influence [the mind] by temporal punishments, or burdens, or by civil incapacitations, tend only to beget habits of hypocrisy and meanness. ..." Any spark of love for country which may be generated in a child or his associates by forcing him to make what is to him an empty gesture and recite words wrung from him contrary to his religious beliefs is overshadowed by the desirability of preserving freedom of conscience to the full. It is in that freedom and the example of persuasion, not in force and compulsion, that the real unity of America lies.

[1] See Jefferson, Autobiography, vol. 1, pp. 53-59.

SUPREME COURT OF THE UNITED STATES.

No. 591.—October Term, 1942.

The West Virginia State Board of Education, etc., et al., Appellants, vs. Walter Barnette, Paul Stull and Lucy McClure.	Appeal from the District Court of the United States for the Southern District of West Virginia.

[June 14, 1943.]

Mr. Justice Frankfurter, dissenting.

One who belongs to the most vilified and persecuted minority in history is not likely to be insensible to the freedoms guaranteed by our Constitution. Were my purely personal attitude relevant I should wholeheartedly associate myself with the general libertarian views in the Court's opinion, representing as they do the thought and action of a lifetime. But as judges we are neither Jew nor Gentile, neither Catholic nor agnostic. We owe equal attachment to the Constitution and are equally bound by our judicial obligations whether we derive our citizenship from the earliest or the latest immigrants to these shores. As a member of this Court I am not justified in writing my private notions of policy into the Constitution, no matter how deeply I may cherish them or how mischievous I may deem their disregard. The duty of a judge who must decide which of two claims before the Court shall prevail, that of a State to enact and enforce laws within its general competence or that of an individual to refuse obedience because of the demands of his conscience, is not that of the ordinary person. It can never be emphasized too much that one's own opinion about the wisdom or evil of a law should be excluded altogether when one is doing one's duty on the bench. The only opinion of our own even looking in that direction that is material is our opinion whether legislators could in reason have enacted such a law. In the light of all the circumstances, including the history of this question in this Court, it would require more daring than I possess to deny that reasonable legislators could have taken the action which is before us for review. Most unwillingly, therefore, I must differ from my

brethren with regard to legislation like this. I cannot bring my mind to believe that the "liberty" secured by the Due Process Clause gives this Court authority to deny to the State of West Virginia the attainment of that which we all recognize as a legitimate legislative end, namely, the promotion of good citizenship, by employment of the means here chosen.

Not so long ago we were admonished that "the only check upon our own exercise of power is our own sense of self-restraint. For the removal of unwise laws from the statute books appeal lies not to the courts but to the ballot and to the processes of democratic government." *United States* v. *Butler*, 297 U. S. 1, 79 (dissent). We have been told that generalities do not decide concrete cases. But the intensity with which a general principle is held may determine a particular issue, and whether we put first things first may decide a specific controversy.

The admonition that judicial self-restraint alone limits arbitrary exercise of our authority is relevant every time we are asked to nullify legislation. The Constitution does not give us greater veto power when dealing with one phase of "liberty" than with another, or when dealing with grade school regulations than with college regulations that offend conscience, as was the case in *Hamilton* v. *Regents*, 293 U. S. 245. In neither situation is our function comparable to that of a legislature or are we free to act as though we were a super-legislature. Judicial self-restraint is equally necessary whenever an exercise of political or legislative power is challenged. There is no warrant in the constitutional basis of this Court's authority for attributing different rôles to it depending upon the nature of the challenge to the legislation. Our power does not vary according to the particular provision of the Bill of Rights which is invoked. The right not to have property taken without just compensation has, so far as the scope of judicial power is concerned, the same constitutional dignity as the right to be protected against unreasonable searches and seizures, and the latter has no less claim than freedom of the press or freedom of speech or religious freedom. In no instance is this Court the primary protector of the particular liberty that is invoked. This Court has recognized, what hardly could be denied, that all the provisions of the first ten Amendments are "specific" prohibitions, *U. S.* v. *Carolene Products Co.*, 304 U. S. 144, 152, n. 4. But each specific Amendment, in so far as em-

braced within the Fourteenth Amendment, must be equally respected, and the function of this Court does not differ in passing on the constitutionality of legislation challenged under different Amendments.

When Mr. Justice Holmes, speaking for this Court, wrote that "it must be remembered that legislatures are ultimate guardians of the liberties and welfare of the people in quite as great a degree as the courts", *Missouri, Kansas & Texas Ry. Co.* v. *May*, 194 U. S. 267, 270, he went to the very essence of our constitutional system and the democratic conception of our society. He did not mean that for only some phases of civil government this Court was not to supplant legislatures and sit in judgment upon the right or wrong of a challenged measure. He was stating the comprehensive judicial duty and rôle of this Court in our constitutional scheme whenever legislation is sought to be nullified on any ground, namely, that responsibility for legislation lies with legislatures, answerable as they are directly to the people, and this Court's only and very narrow function is to determine whether within the broad grant of authority vested in legislatures they have exercised a judgment for which reasonable justification can be offered.

The framers of the federal Constitution might have chosen to assign an active share in the process of legislation to this Court. They had before them the well-known example of New York's Council of Revision, which had been functioning since 1777. After stating that "laws inconsistent with the spirit of this constitution, or with the public good, may be hastily and unadvisedly passed", the state constitution made the judges of New York part of the legislative process by providing that "all bills which have passed the senate and assembly shall, before they become laws", be presented to a Council of which the judges constituted a majority, "for their revisal and consideration". Art III, New York Constitution of 1777. Judges exercised this legislative function in New York for nearly fifty years. See Art. I, § 12, New York Constitution of 1821. But the framers of the Constitution denied such legislative powers to the federal judiciary. They chose instead to insulate the judiciary from the legislative function. They did not grant to this Court supervision over legislation.

The reason why from the beginning even the narrow judicial authority to nullify legislation has been viewed with a jealous

eye is that it serves to prevent the full play of the democratic process. The fact that it may be an undemocratic aspect of our scheme of government does not call for its rejection or its disuse. But it is the best of reasons, as this Court has frequently recognized, for the greatest caution in its use.

The precise scope of the question before us defines the limits of the constitutional power that is in issue. The State of West Virginia requires all pupils to share in the salute to the flag as part of school training in citizenship. The present action is one to enjoin the enforcement of this requirement by those in school attendance. We have not before us any attempt by the State to punish disobedient children or visit penal consequences on their parents. All that is in question is the right of the State to compel participation in this exercise by those who choose to attend the public schools.

We are not reviewing merely the action of a local school board. The flag salute requirement in this case comes before us with the full authority of the State of West Virginia. We are in fact passing judgment on "the power of the State as a whole". *Rippey* v. *Texas*, 193 U. S. 504, 509; *Skiriotes* v. *Florida*, 313 U. S. 69, 79. Practically we are passing upon the political power of each of the forty-eight states. To suggest that we are here concerned with the heedless action of some village tyrants is to distort the augustness of the constitutional issue and the reach of the consequences of our decision.

Under our constitutional system the legislature is charged solely with civil concerns of society. If the avowed or intrinsic legislative purpose is either to promote or to discourage some religious community or creed, it is clearly within the constitutional restrictions imposed on legislatures and cannot stand. But it by no means follows that legislative power is wanting whenever a general non-discriminatory civil regulation in fact touches conscientious scruples or religious beliefs of an individual or a group. Regard for such scruples or beliefs undoubtedly presents one of the most reasonable claims for the exertion of legislative accommodation. It is, of course, beyond our power to rewrite the State's requirement, by providing exemptions for those who do not wish to participate in the flag salute or by making some other accommodations to meet their scruples. That wisdom might suggest the making of such accommodations and that school administration would not find it too difficult to make them and yet maintain the

Moreover, since the First amendment has been read into the Fourteenth, our problem is precisely the same as it would be if we had before us an Act of Congress for the District of Columbia.

ceremony for those not refusing to conform, is outside our province to suggest. Tact, respect, and generosity toward variant views will always commend themselves to those charged with the duties of legislation so as to achieve a maximum of good will and to require a minimum of unwilling submission to a general law. But the real question is, who is to make such accommodations, the courts or the legislature?

This is no dry, technical matter. It cuts deep into one's conception of the democratic process—it concerns no less the practical differences between the means for making these accommodations that are open to courts and to legislatures. A court can only strike down. It can only say "This or that law is void." It cannot modify or qualify, it cannot make exceptions to a general requirement. And it strikes down not merely for a day. At least the finding of unconstitutionality ought not to have ephemeral significance unless the Constitution is to be reduced to the fugitive importance of mere legislation. When we are dealing with the Constitution of the United States, and more particularly with the great safeguards of the Bill of Rights, we are dealing with principles of liberty and justice "so rooted in the traditions and conscience of our people as to be ranked as fundamental"—something without which "a fair and enlightened system of justice would be impossible". *Palko* v. *Connecticut*, 302 U. S. 319, 325; *Hurtado* v. *California*, 110 U. S. 516, 530, 531. If the function of this Court is to be essentially no different from that of a legislature, if the considerations governing constitutional construction are to be substantially those that underlie legislation, then indeed judges should not have life tenure and they should be made directly responsible to the electorate.

Conscientious scruples, all would admit, cannot stand against every legislative compulsion to do positive acts in conflict with such scruples. We have been told that such compulsions override religious scruples only as to major concerns of the state. But the determination of what is major and what is minor itself raises questions of policy. For the way in which men equally guided by reason appraise importance goes to the very heart of policy. Judges should be very diffident in setting their judgment against that of a state in determining what is and what is not a major concern, what means are appropriate to proper ends, and what is the total social cost in striking the balance of imponderables.

There have been many but unsuccessful proposals in the last sixty years to amend the Constitution to that end. See Sen. Doc. No. 91, 75th Cong., 1st Sess., pp. 248-51.

What one can say with assurance is that the history out of which grew constitutional provisions for religious equality and the writings of the great exponents of religious freedom—Jefferson, Madison, John Adams, Benjamin Franklin—are totally wanting in justification for a claim by dissidents of exceptional immunity from civic measures of general applicability, measures not in fact disguised assaults upon such dissident views. The great leaders of the American Revolution were determined to remove political support from every religious establishment. They put on an equality the different religious sects—Episcopalians, Presbyterians, Catholics, Baptists, Methodists, Quakers, Huguenots—which, as dissenters, had been under the heel of the various orthodoxies that prevailed in different colonies. So far as the state was concerned, there was to be neither orthodoxy nor heterodoxy. And so Jefferson and those who followed him wrote guarantees of religious freedom into our constitutions. Religious minorities as well as religious majorities were to be equal in the eyes of the political state. But Jefferson and the others also knew that minorities may disrupt society. It never would have occurred to them to write into the Constitution the subordination of the general civil authority of the state to sectarian scruples.

The constitutional protection of religious freedom terminated disabilities, it did not create new privileges. It gave religious equality, not civil immunity. Its essence is freedom from conformity to religious dogma, not freedom from conformity to law because of religious dogma. Religious loyalties may be exercised without hindrance from the state, not the state may not exercise that which except by leave of religious loyalties is within the domain of temporal power. Otherwise each individual could set up his own censor against obedience to laws conscientiously deemed for the public good by those whose business it is to make laws.

The prohibition against any religious establishment by the government placed denominations on an equal footing—it assured freedom from support by the government to any mode of worship and the freedom of individuals to support any mode of worship. Any person may therefore believe or disbelieve what he pleases. He may practice what he will in his own house of worship or publicly within the limits of public order. But the lawmaking authority is not circumscribed by the variety of religious beliefs, otherwise the constitutional guarantee would be not a protection of the free exercise of religion but a denial of the exercise of legislation.

The essence of the religious freedom guaranteed by our Constitution is therefore this: no religion shall either receive the state's support or incur its hostility. Religion is outside the sphere of political government. This does not mean that all matters on which religious organizations or beliefs may pronounce are outside the sphere of government. Were this so, instead of the separation of church and state, there would be the subordination of the state on any matter deemed within the sovereignty of the religious conscience. Much that is the concern of temporal authority affects the spiritual interests of men. But it is not enough to strike down a non-discriminatory law that it may hurt or offend some dissident view. It would be too easy to cite numerous prohibitions and injunctions to which laws run counter if the variant interpretations of the Bible were made the tests of obedience to law. The validity of secular laws cannot be measured by their conformity to religious doctrines. It is only in a theocratic state that ecclesiastical doctrines measure legal right or wrong.

An act compelling profession of allegiance to a religion, no matter how subtly or tenuously promoted, is bad. But an act promoting good citizenship and national allegiance is within the domain of governmental authority and is therefore to be judged by the same considerations of power and of constitutionality as those involved in the many claims of immunity from civil obedience because of religious scruples.

That claims are pressed on behalf of sincere religious convictions does not of itself establish their constitutional validity. Nor does waving the banner of religious freedom relieve us from examining into the power we are asked to deny the states. Otherwise the doctrine of separation of church and state, so carefully in the history of this nation and for the liberty of our people would mean not the disestablishment of a state church but the establishment of all churches and of all religious groups.

The subjection of dissidents to the general requirement of saluting the flag, as a measure conducive to the training of children in good citizenship, is very far from being the first instance of exacting obedience to general laws that have offended deep religious scruples. Compulsory vaccination, see *Jacobson* v. *Massachusetts*, 197 U. S. 11, food inspection regulations, see *Shapiro* v. *Luke*, 30 F. 2d 971, the obligation to bear arms, see *Hamilton* v. *Regents*, 293 U. S. 245, 267, testimonial duties, see *Stansbury* v.

Marks, 2 Dall. 213, compulsory medical treatment, see *People* v. *Vogelgesang*, 221 N. Y. 290— these are but illustrations of conduct that has often been compelled in the enforcement of legislation of general applicability even though the religious consciences of particular individuals rebelled at the exaction.

Law is concerned with external behavior and not with the inner life of man. It rests in large measure upon compulsion. Socrates lives in history partly because he gave his life for the conviction that duty of obedience to secular law does not presuppose consent to its enactment or belief in its virtue. The consent upon which free government rests is the consent that comes from sharing in the process of making and unmaking laws. The state is not shut out from a domain because the individual conscience may deny the state's claim. The individual conscience may profess what faith it chooses. It may affirm and promote that faith—in the language of the Constitution, it may "exercise" it freely—but it cannot thereby restrict community action through political organs in matters of community concern, so long as the action is not asserted in a discriminatory way either openly or by stealth. One may have the right to practice one's religion and at the same time owe the duty of formal obedience to laws that run counter to one's beliefs. Compelling belief implies denial of opportunity to combat it and to assert dissident views. Such compulsion is one thing. Quite another matter is submission to conformity of action while denying its wisdom or virtue and with ample opportunity for seeking its change or abrogation.

In *Hamilton* v. *Regents*, 293 U. S. 245, this Court unanimously held that one attending a state-maintained university cannot refuse attendance on courses that offend his religious scruples. That decision is not overruled today, but is distinguished on the ground that attendance at the institution for higher education was voluntary and therefore a student could not refuse compliance with its conditions and yet take advantage of its opportunities. But West Virginia does not compel the attendance at its public schools of the children here concerned. West Virginia does not so compel, for it cannot. This Court denied the right of a state to require its children to attend public schools. *Pierce* v. *Society of Sisters*, 268 U. S. 510. As to its public schools, West Virginia imposes conditions which it deems necessary in the development of future citizens precisely as California deemed necessary the

requirements that offended the student's conscience in the *Hamilton* case. The need for higher education and the duty of the state to provide it as part of a public educational system, are part of the democratic faith of most of our states. The right to secure such education in institutions not maintained by public funds is unquestioned. But the practical opportunities for obtaining what is becoming in increasing measure the conventional equipment of American youth may be no less burdensome than that which parents are increasingly called upon to bear in sending their children to parochial schools because the education provided by public schools, though supported by their taxes, does not satisfy their ethical and educational necessities. I find it impossible, so far as constitutional power is concerned, to differentiate what was sanctioned in the *Hamilton* case from what is nullified in this case. And for me it still remains to be explained why the grounds of Mr. Justice Cardozo's opinion in *Hamilton* v. *Regents*, *supra*, are not sufficient to sustain the flag salute requirement. Such a requirement, like the requirement in the *Hamilton* case, "is not an interference by the state with the free exercise of religion when the liberties of the constitution are read in the light of a century and a half of history during days of peace and war." 293 U. S. 245, 266. The religious worshiper, "if his liberties were to be thus extended, might refuse to contribute taxes . . . in furtherance of any other end condemned by his conscience as irreligious or immoral. The right of private judgment has never yet been so exalted above the powers and the compulsion of the agencies of government." *Id.*, at 268.

Parents have the privilege of choosing which schools they wish their children to attend. And the question here is whether the state may make certain requirements that seem to it desirable or important for the proper education of those future citizens who go to schools maintained by the states, or whether the pupils in those schools may be relieved from those requirements if they run counter to the consciences of their parents. Not only have parents the right to send children to schools of their own choosing but the state has no right to bring such schools "under a strict governmental control" or give "affirmative direction concerning the intimate and essential details of such schools, entrust their control to public officers, and deny both owners and patrons reasonable choice and discretion in respect of teachers, curriculum, and text-

books". *Farrington* v. *Tokushige*, 273 U. S. 284, 298. Why should not the state likewise have constitutional power to make reasonable provisions for the proper instruction of children in schools maintained by it?

When dealing with religious scruples we are dealing with an almost numberless variety of doctrines and beliefs entertained with equal sincerity by the particular groups for which they satisfy man's needs in his relation to the mysteries of the universe. There are in the United States more than 250 distinctive established religious denominations. In the state of Pennsylvania there are 120 of these, and in West Virginia as many as 65. But if religious scruples afford immunity from civic obedience to laws, they may be invoked by the religious beliefs of any individual even though he holds no membership in any sect or organized denomination. Certainly this Court cannot be called upon to determine what claims of conscience should be recognized and what should be rejected as satisfying the "religion" which the Constitution protects. That would indeed resurrect the very discriminatory treatment of religion which the Constitution sought forever to forbid. And so, when confronted with the task of considering the claims of immunity from obedience to a law dealing with civil affairs because of religious scruples, we cannot conceive religion more narrowly than in the terms in which Judge Augustus N. Hand recently characterized it:

"It is unnecessary to attempt a definition of religion; the content of the term is found in the history of the human race and is incapable of compression into a few words. Religious belief arises from a sense of the inadequacy of reason as a means of relating the individual to his fellowmen and to his universe. . . . [It] may justly be regarded as a response of the individual to an inward mentor, call it conscience or God, that is for many persons at the present time the equivalent of what has always been thought a religious impulse." *United States* v. *Kauten*, 133 F. 2d 703, 708.

Consider the controversial issue of compulsory Bible-reading in public schools. The educational policies of the states are in great conflict over this, and the state courts are divided in their decisions on the issue whether the requirement of Bible-reading offends constitutional provisions dealing with religious freedom. The requirement of Bible-reading has been justified by various state courts as an appropriate means of inculcating ethical precepts and familiarizing pupils with the most lasting expression of great English literature. Is this Court to overthrow such variant state

educational policies by denying states the right to entertain such convictions in regard to their school systems, because of a belief that the King James version is in fact a sectarian text to which parents of the Catholic and Jewish faiths and of some Protestant persuasions may rightly object to having their children exposed? On the other hand the religious consciences of some parents may rebel at the absence of any Bible-reading in the schools. See *Washington ex rel. Chithero* v. *Shoemaker*, 284 U. S. 573. Or is this Court to enter the old controversy between science and religion by unduly defining the limits within which a state may experiment with its school curricula? The religious consciences of some parents may be offended by subjecting their children to the Biblical account of creation, while another state may offend parents by prohibiting a teaching of biology that contradicts such Biblical account. Compare *Scopes* v. *State*, 154 Tenn. 105. What of conscientious objections to what is devoutly felt by parents to be the poisoning of impressionable minds of children by chauvinistic teaching of history? This is very far from a fanciful suggestion for in the belief of many thoughtful people nationalism is the seed-bed of war.

There are other issues in the offing which admonish us of the difficulties and complexities that confront states in the duty of administering their local school systems. All citizens are taxed for the support of public schools although this Court has denied the right of a state to compel all children to go to such schools and has recognized the right of parents to send children to privately maintained schools. Parents who are dissatisfied with the public schools thus carry a double educational burden. Children who go to public school enjoy in many states derivative advantages such as free text books, free lunch, and free transportation in going to and from school. What of the claims for equality of treatment of those parents who, because of religious scruples, cannot send their children to public schools? What of the claim that if the right to send children to privately maintained schools is partly an exercise of religious conviction, to render effective this right it should be accompanied by equality of treatment by the state in supplying free textbooks, free lunch, and free transportation to children who go to private schools? What of the claim that such grants are offensive to the cardinal constitutional doctrine of separation of church and state?

These questions assume increasing importance in view of the steady growth of parochial schools both in number and in population. I am not borrowing trouble by adumbrating these issues nor am I parading horrible examples of the consequences of today's decision. I am aware that we must decide the case before us and not some other case. But that does not mean that a case is dissociated from the past and unrelated to the future. We must decide this case with due regard for what went before and no less regard for what may come after. Is it really a fair construction of such a fundamental concept as the right freely to exercise one's religion that a state cannot choose to require all children who attend public school to make the same gesture of allegience to the symbol of our national life because it may offend the conscience of some children, but that it may compel all children to attend public school to listen to the King James version although it may offend the consciences of their parents? And what of the larger issue of claiming immunity from obedience to a general civil regulation that has a reasonable relation to a public purpose within the general competence of the state? See *Pierce* v. *Society of Sisters*, 268 U. S. 510, 535. Another member of the sect now before us insisted that in forbidding her two little girls, aged nine and twelve, to distribute pamphlets Oregon infringed her and their freedom of religion in that the children were engaged in "preaching the gospel of God's Kingdom". A procedural technicality led to the dismissal of the case, but the problem remains. *McSparran* v. *City of Portland*, No. 597, this Term.

These questions are not lightly stirred. They touch the most delicate issues and their solution challenges the best wisdom of political and religious statesmen. But it presents awful possibilities to try to encase the solution of these problems within the rigid prohibitions of unconstitutionality.

We are told that a flag salute is a doubtful substitute for adequate understanding of our institutions. The states that require such a school exercise do not have to justify it as the only means for promoting good citizenship in children, but merely as one of diverse means for accomplishing a worthy end. We may deem it a foolish measure, but the point is that this Court is not the organ of government to resolve doubts as to whether it will fulfill its purpose. Only if there be no doubt that any reasonable mind could entertain can we deny to the states the right to resolve doubts their way and not ours

that which to the majority may seem essential for the welfare of the state may offend the consciences of a minority. But, so long as no inroads are made upon the actual exercise of religion by the minority, to deny the political power of the majority to enact laws concerned with civil matters, simply because they may offend the consciences of a minority, really means that the consciences of a minority are more sacred and more enshrined in the Constitution than the consciences of a majority.

We are told that symbolism is a dramatic but primitive way of communicating ideas. Symbolism is inescapable. Even the most sophisticated live by symbols. But it is not for this Court to make psychological judgments as to the effectiveness of a particular symbol in inculcating concededly indispensable feelings, particularly if the State happens to see fit to utilize the symbol that represents our heritage and our hopes. And surely only flippancy could be responsible for the suggestion that constitutional validity of a requirement to salute our flag implies equal validity of a requirement to salute a dictator. The significance of a symbol lies in what it represents. To reject the swastika does not imply rejection of the Cross. And so it bears repetition to say that it mocks reason and denies our whole history to find in the allowance of a requirement to salute our flag on fitting occasions the seeds of sanction for obeisance to a leader. To deny the power to employ educational symbols is to say that the state's educational system may not stimulate the imagination because this may lead to unwise stimulation.

The right of West Virginia to utilize the flag salute as part of its educational process is denied because, so it is argued, it cannot be justified as a means of meeting a "clear and present danger" to national unity. In passing it deserves to be noted that the four cases which unanimously sustained the power of states to utilize such an educational measure arose and were all decided before the present World War. But to measure the state's power to make such regulations as are here resisted by the imminence of national danger is wholly to misconceive the origin and purpose of the concept of "clear and present danger". To apply such a test is for the Court to assume, however unwittingly, a legislative responsibility that does not belong to it. To talk about "clear and present danger" as the touchstone of allowable educational policy by the states whenever school curricula may impinge upon the boundaries of individual conscience, is to take a felicitous phrase out of the context of the particular situation where

arose and for which it was adapted. Mr. Justice Holmes used the phrase "clear and present danger" in a case involving mere speech as a means by which alone to accomplish sedition in time of war. By that phrase he meant merely to indicate that, in view of the protection given to utterance by the First Amendment, in order that mere utterance may not be proscribed, "the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent." *Schenck* v. *United States*, 249 U. S. 47, 52. The "substantive evils" about which he was speaking were inducement of insubordination in the military and naval forces of the United States and obstruction of enlistment while the country was at war. He was not enunciating a formal rule that there can be no restriction upon speech and, still less, no compulsion where conscience balks, unless imminent danger would thereby be wrought "to our institutions or our government".

The flag salute exercise has no kinship whatever to the oath tests so odious in history. For the oath test was one of the instruments for suppressing heretical beliefs. Saluting the flag suppresses no belief nor curbs it. Children and their parents may believe what they please, avow their belief and practice it. It is not even remotely suggested that the requirement for saluting the flag involves the slightest restriction against the fullest opportunity on the part both of the children and of their parents to disavow as publicly as they choose to do so the meaning that others attach to the gesture of salute. All channels of affirmative free expression are open to both children and parents. Had we before us any act of the state putting the slightest curbs upon such free expression, I should not lag behind any member of this Court in striking down such an invasion of the right to freedom of thought and freedom of speech protected by the Constitution.

I am fortified in my view of this case by the history of the flag salute controversy in this Court. Five times has the precise question now before us been adjudicated. Four times the Court unanimously found that the requirement of such a school exercise was not beyond the powers of the states. Indeed in the first three cases to come before the Court the constitutional claim now sustained was deemed so clearly unmeritorious that this Court dismissed the appeals for want of a substantial federal question. *Leoles* v. *Landers*, 302 U. S. 656; *Hering* v. *State Board of Edu-*

cation, 303 U. S. 624; *Gabrielli* v. *Knickerbocker*, 306 U. S. 621. In the fourth case the judgment of the district court upholding the state law was summarily affirmed on the authority of the earlier cases. *Johnson* v. *Deerfield*, 306 U. S. 621. The fifth case, *Minersville District* v. *Gobitis*, 310 U. S. 586, was brought here because the decision of the Circuit Court of Appeals for the Third Circuit ran counter to our rulings. They were reaffirmed after full consideration, with one Justice dissenting.

What may be even more significant than this uniform recognition of state authority is the fact that every Justice—thirteen in all—who has hitherto participated in judging this matter has at one or more times found no constitutional infirmity in what is now condemned. Only the two Justices sitting for the first time on this matter have not heretofore found this legislation inoffensive to the "liberty" guaranteed by the Constitution. And among the Justices who sustained this measure were outstanding judicial leaders in the zealous enforcement of constitutional safeguards of civil liberties—men like Chief Justice Hughes, Mr. Justice Brandeis, and Mr. Justice Cardozo, to mention only those no longer on the Court.

three of Stone's witness cases (except for minor deviations subsequently retracted)

One's conception of the Constitution cannot be severed from one's conception of a judge's function in applying it. The Court has no reason for existence if it merely reflects the pressures of the day. Our system is built on the faith that men set apart for this special function, freed from the influences of immediacy and from the deflections of worldly ambition, will become able to take a view of longer range than the period of responsibility entrusted to Congress and legislatures. We are dealing with matters as to which legislators and voters have conflicting views. Are we as judges to impose our strong convictions on where wisdom lies? That which three years ago had seemed to five successive Courts to be within permissible areas of legislation is now outlawed by the deciding shift of opinion of two Justices. What reason is there to believe that they or their successors may not have another view a few years hence? Is that which was deemed to be of so fundamental a nature as to be written into the Constitution to endure for all times to be the sport of shifting winds of doctrine? Of course, judicial opinions, even as to questions of constitutionality, are not immutable. As has been true in the past, the Court will from time to time reverse its position. But I believe that never before has this Court ~~changed its views~~ so as to restrict the powers of democratic government. Always heretofore, it has

overruled decisions -

withdrawn narrow views of legislative authority so as to authorize what formerly it had denied.

In view of this history it must be plain that what thirteen Justices found to be within the constitutional authority of a state legislators can not be deemed unreasonable in enacting. Therefore, in denying to the states what heretofore has received such impressive judicial sanction, some other tests of unconstitutionality must surely be guiding the Court than the absence of a rational justification for the legislation. But I know of no other test which this Court is authorized to apply in nullifying legislation.

In the past this Court has from time to time set its views of policy against that embodied in legislation by finding laws in conflict with what was called the "spirit of the Constitution". Such undefined destructive power was not conferred on this Court by the Constitution. Before a duly enacted law can be judicially nullified, it must be forbidden by some explicit restriction upon political authority in the Constitution. Equally inadmissible is the claim to strike down legislation because to us as individuals it seems opposed to the "plan and purpose" of the Constitution. That is too tempting a basis for finding in one's personal views the purposes of the Founders.

The uncontrollable power wielded by this Court brings it very close to the most sensitive areas of public affairs. As appeal from legislation to adjudication becomes more frequent, and its consequences more far-reaching, judicial self-restraint becomes more and not less important, lest we unwarrantably enter social and political domains wholly outside our concern. I think I appreciate fully the objections to the law before us. But to deny that it presents a question upon which men might reasonably differ appears to me to be intolerance. And since men may so reasonably differ, I deem it beyond my constitutional power to assert my view of the wisdom of this law against the view of the State of West Virginia.

Jefferson's opposition to judicial review has not been accepted by history, but it still serves as an admonition against confusion between judicial and political functions. As a rule of judicial self-restraint, it is still as valid as Lincoln's admonition. For those who pass laws not only are under duty to pass laws. They are also under duty to observe the Constitution. And even though legislation relates to civil liberties, our duty of deference to those

who have the responsibility for making the laws is no less relevant or less exacting. And this is so especially when we consider the accidental contingencies by which one man may determine constitutionality and thereby confine the political power of the Congress of the United States and the legislatures of forty-eight states. The attitude of judicial humility which these considerations enjoin is not an abdication of the judicial function. It is a due observance of its limits. Moreover, it is to be borne in mind that in a question like this we are not passing on the proper distribution of political power as between the states and the central government. We are not discharging the basic function of this Court as the mediator of powers within the federal system. To strike down a law like this is to deny a power to all government.

The whole Court is conscious that this case reaches ultimate questions of judicial power and its relation to our scheme of government. It is appropriate, therefore, to recall an utterance as wise as any that I know in analyzing what is really involved when the theory of this Court's function is put to the test of practice. The analysis is that of James Bradley Thayer:

"... there has developed a vast and growing increase of judicial interference with legislation. This is a very different state of things from what our fathers contemplated, a century and more ago, in framing the new system. Seldom, indeed, as they imagined, under our system, would this great, novel, tremendous power of the courts be exerted,—would this sacred ark of the covenant be taken from within the veil. Marshall himself expressed truly one aspect of the matter, when he said in one of the later years of his life: 'No questions can be brought before a judicial tribunal of greater delicacy than those which involve the constitutionality of legislative acts. If they become indispensably necessary to the case, the court must meet and decide them; but if the case may be determined on other grounds, a just respect for the legislature requires that the obligation of its laws should not be unnecessarily and wantonly assailed.' And again, a little earlier than this, he laid down the one true rule of duty for the courts. When he went to Philadelphia at the end of September, in 1831, on that pathetic errand of which I have spoken, in answering a cordial tribute from the bar of that city he remarked that if he might be permitted to claim for himself and his associates any part of the kind things they had said, it would be this, that they had 'never sought to enlarge the judicial power beyond its proper bounds, nor feared to carry it to the fullest extent that duty required.'

"That is the safe two-fold rule: nor is the first part of it any whit less important than the second; nay, more; to-day it is the part which most requires to be emphasized. For just here comes in

onsideration of very great weight. Great and, indeed, inestimable as are the advantages in a popular government of this conservative influence,—the power of the judiciary to disregard unconstitutional legislation,—it should be remembered that the exercise of it, even when unavoidable, is always attended with a serious evil, namely, that the correction of legislative mistakes comes from the outside, and the people thus lose the political experience, and the moral education and stimulus that come from fighting the question out in the ordinary way, and correcting their own errors. If the decision in Mann v. Illinois and the 'Granger Cases,' twenty-five years ago, and in the 'Legal Tender Cases,' nearly thirty years ago, had been different; and the legislation there in question, thought by many to be unconstitutional and by many more to be ill-advised, had been set aside, we should have been saved some trouble and some harm. But I venture to think that the good which came to the country and its people from the vigorous thinking that had to be done in the political debates that followed, from the infiltration through every part of the population of sound ideas and sentiments, from the rousing into activity of opposite elements, the enlargement of ideas, the strengthening of moral fibre, and the growth of political experience that came out of it all,—that all this far more than outweighed any evil which ever flowed from the refusal of the court to interfere with the work of the legislature.

"The tendency of a common and easy resort to this great function, now lamentably too common, is to dwarf the political capacity of the people, and to deaden its sense of moral responsibility. It is no light thing to do that.

"What can be done? It is the courts that can do most to cure the evil; and the opportunity is a very great one. Let them resolutely adhere to first principles. Let them consider how narrow is the function which the constitutions have conferred on them, the office merely of deciding litigated cases; how large, therefore, is the duty intrusted to others, and above all to the legislature. It is that body which is charged, primarily, with the duty of judging of the constitutionality of its work. The constitutions generally give them no authority to call upon a court for advice; they must decide for themselves, and the courts may never be able to say a word. Such a body, charged, in every State, with almost all the legislative power of the people, is entitled to the most entire and real respect; is entitled, as among all rationally permissible opinions as to what the constitution allows, to its own choice. Courts, as has often been said, are not to think of the legislators, but of the legislature, the great, continuous body itself, abstracted from all the transitory individuals who may happen to hold its power. It is this majestic representative of the people whose action is in question, a co-ordinate department of the government, charged with the greatest functions and invested, in contemplation

of law with whatsoever wisdom, virtue, and knowledge the exercise of such functions requires.

"To set aside the acts of such a body, representing in its own field, which is the very highest of all, the ultimate sovereign, should be a solemn, unusual, and painful act. Something is wrong when it can ever be other than that. And if it be true that the holders of legislative power are careless or evil, yet the constitutional duty of the court remains untouched; it cannot rightly attempt to protect the people, by undertaking a function not its own. On the other hand, by adhering rigidly to its own duty the court will help, as nothing else can, to fix the spot where responsibility lies, and to bring down on that precise locality the thunderbolt of popular condemnation. The judiciary, to-day, in dealing with the acts of their coordinate legislators, owe to the country no greater or clearer duty than that of keeping their hands off these acts wherever it is possible to do it. For that course—the true course of judicial duty always—will powerfully help to bring the people and their representatives to a sense of their own responsibility. There will still remain to the judiciary an ample field for the determinations of this remarkable jurisdiction, of which our American law has so much reason to be proud, a jurisdiction which has had some of its chief illustrations and its greatest triumphs, as in Marshall's time, so in ours, while the courts were refusing to exercise it." J. B. Thayer, John Marshall (1901) 104-10.

~~It is self-delusive to believe that~~ the liberal spirit ~~can~~ be enforced by judicial invalidation of illiberal legislation. Our constant preoccupation with the constitutionality of legislation rather than with its wisdom tends to preoccupation of the American mind with a false value. The tendency of focussing attention on constitutionality is to make constitutionality synonymous with wisdom, to regard a law as all right if it is constitutional. Such an attitude is a great enemy of liberalism. Particularly in legislation affecting freedom of thought and freedom of speech much which should offend a free-spirited society is constitutional. Reliance for the most precious interests of civilization, therefore, must be found outside of their vindication in courts of law. Only a persistent positive translation of the faith of a free society into the convictions and habits and actions of a community is the ultimate reliance against unabated temptations to fetter the human spirit.

Because patriotism can not be enforced by the flag salute. But neither can